Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 1997 Decided March 14, 1997

No. 96-7033

ROBERT A. MILLER, *et al.*,
Appellants

v.

AIR LINE PILOTS ASSOCIATION,
Appellee

Appeal from the United States District Court
for the District of Columbia
(91cv3161)

Before: SILBERMAN, WILLIAMS, and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Nonunion pilots appeal the judgment of the district court, which largely relied on an arbitrator's award, as to the legality of the union's agency shop fees. We reverse.

I.

Appellee Air Line Pilots Association (hereinafter ALPA or the union), is the exclusive collective bargaining representative of all pilots employed by Delta. In 1991, ALPA and Delta entered into an "agency shop"

agreement under the Railway Labor Act (RLA), effective at the start of 1992, which requires all pilots who choose not to be members of ALPA to pay a "service charge" to ALPA "as a contribution for the administration of the [collective bargaining agreement] and the representation of [all] employees."

ALPA collected fees from appellants, 153 Delta pilots who have not joined the union (hereinafter the pilots), by following the procedures contained in its operating manual, Policies and Procedures Applicable to Agency Fees. The manual, in accordance with federal law, allows nonmembers to object to fees used for purposes not germane to collective bargaining. ALPA charged nonmembers fees approximately 8% less than union dues from January 1 through June 30, 1992. That figure, which was an estimate, was based on 1990 outlays. But for the latter half of 1992, the union discounted the pilots' fees by about 17% because of newly available figures from 1991. ALPA sent each nonmember pilot a copy of its Policies and Procedures with both the 1990 and 1991 statements. When the actual figures for 1992 became available, the union determined that 19% of its expenses for the year were nongermane and gave objecting pilots an adjusted credit or rebate with interest.

Appellants, still dissatisfied with the union's calculations and procedures, protested. The union, treating that protest—despite appellants' objection—as a request for arbitration under the union's Policies and Procedures, initiated arbitration proceedings. The Policies and Procedures specify that the American Arbitration Association (AAA) Rules for Impartial Determination of Union Fees govern such arbitrations, so, at the union's request, the AAA appointed an arbitrator in accordance with its rules from "a special panel of arbitrators experienced in employment relations." A number of the pilots had previously filed suit (before the agency shop agreement went

into effect) against the union in federal district court and, wanting federal court resolution of all of its disputes regarding union fees, it asked the arbitrator not to proceed and sought a district court injunction to stop the arbitration. The district court denied the injunction, and the arbitrator refused to delay. The pilots' attorney consequently entered only a conditional appearance in the arbitration.

The arbitrator sustained most of the challenged union determinations as to which of its expenses were germane. Ninety-one of the 158 pilots who participated in the arbitration (either willingly or unwillingly) were parties in the district court suit; the other 67 of those who participated did not challenge the arbitrator's award. Sixty-two more who did not participate in the arbitration proceedings intervened in district courts. We therefore have before us only the pilots who appeared before the arbitrator under protest or those who refused to do so at all.

The pilots who had been represented in arbitration had sought discovery, but the arbitrator refused to utilize his authority under the AAA rules to permit such. In district court, ALPA objected to the magistrate's discovery order requiring the union to produce all documents identifying the nature of and expenses related to 20 sample projects; it offered instead what the pilots regarded as impractical: all of its 1992 expense records. The district court cut short the discovery dispute by granting summary judgment against the pilots on almost all of their claims, with the exception of the effect of arbitration on the proceeding. The district court received additional briefing on the latter and subsequently ruled arbitration was required. Relying on the arbitrator's factual findings, the district court affirmed ALPA's method of recordkeeping and its treatment of overhead expenses.

II.

Appellants' most fundamental quarrel with the district court's opinion is directed at its conclusion that dissenter pilots were obliged to "exhaust" the arbitration procedures the union invoked before coming to court. (It will be recalled that some of appellants declined to go to arbitration and the others complied only under protest.) If they are correct on that issue, then the parties' dispute as to the scope of review of the arbitrator's decision is beside the point. Appellants' argument is simply this: We cannot be required to put to an arbitrator our claim against the union under federal law because we have never agreed to do so. That general proposition has been widely recognized by federal courts in a variety of circumstances. *See, e.g., AT&T Technologies, Inc. v. Communication Workers of America,* 475 U.S. 643, 648-49 (1986) (citing the *Steelworkers Trilogy*); *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 374 (1974); *Blake Const. Co., Inc. v. Laborers' Int'l Union of North America, AFL-CIO,* 511 F.2d 324, 327 (D.C. Cir. 1975). We have recently held that dissident agency shop telephone company employees, similarly challenging an agency fee, were not obliged to accept a union's arbitration procedure in accordance with the union's constitution since they were not members of the union and never agreed to submit their dispute to arbitration. *Abrams v. Communications Workers of America,* 59 F.3d 1373, 1382 (D.C. Cir. 1995).

The union and the district court, however, rely on another of our recent decisions, *Communication Workers of America v. American Telephone & Telegraph Co.,* 40 F.3d 426 (D.C. Cir. 1994), in which we held that employees wishing to challenge decisions of pension plan administrators under federal law (ERISA) were obliged to exhaust administrative remedies before going to court. And the union would have us distinguish *Abrams* because

the agency shop agreement there was governed by § 8 (a)(3) of the National Labor Relations Act (NLRA), whereas in this case the parties are covered by § 2, Eleventh of the RLA. Under the RLA—but not the NLRA, according to the union—agency shop agreements threaten to trench on the First Amendment rights of those nonunion workers who are required, in part by operation of federal law, to make payments to the union. Since the dividing line between germane and nongermane activities has constitutional significance under the RLA, the union is *obliged* per the Supreme Court's decision in *Chicago Teachers Union Local No. 1 v. Hudson,* 475 U.S. 292 (1986), to offer a neutral arbitrator to dissident employees for prompt review of the union's allocation of its expenses between those categories. Therefore the union contends the dissidents should be reciprocally required to "exhaust" arbitration procedures; otherwise, the union would be forced frequently to litigate in both fora simultaneously—if some dissidents chose arbitration and others the federal court to pursue similar claims—causing it great expense and confusion.

We can readily distinguish *Communications Workers*; that parallels a true exhaustion case whereas this does not. The doctrine of exhaustion of administrative remedies typically is applied to ensure that senior officials in a government agency have authoritatively ruled, in accordance with available procedures, on an issue that a party attempts to bring to court based on a preliminary decision of a subordinate official. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938). In *Communications Workers,* we merely applied that reasoning to ERISA-governed pension plans. There, plan administrators had denied benefits to a claimant. But the plan provided for review of the administrators' decision by an Employee Benefit Committee, and we were unwilling to indulge the plaintiff's contention that an appeal to the committee necessarily would have been futile. Since under ERISA

discretionary decisions of plan administrators determining eligibility for benefits or interpreting the terms of the plan are reviewed quite deferentially (abuse of discretion), *see Firestone Tire and Rubber Co. v. Burch*, 489 U.S. 101, 115 (1989), we thought it particularly important that the decision we evaluated represent the considered and reasoned view of the highest plan authority. Thus, we extended the exhaustion doctrine to this nongovernmental structure. *Communications Workers*, 40 F.3d at 433.

This case, however, is far removed from the exhaustion paradigm. The arbitrator is not a senior official in the union hiearchy, and even if he were, there is no statutory ground to defer to either the union or the arbitrator on any of the issues presented in the case. The only reason an arbitrator's decision is normally afforded deference in a federal court is because the parties have *agreed* to put their dispute to him or her. *Cf. id.* at 434. The union does claim that the arbitrator's decision is entitled to deference but, in truth, the union's reasoning is circular. The arbitrator's decision, it is argued, should not be reviewed *de novo*, because if it were reviewed *de novo*, it would make little sense to force the pilots to go to arbitration in the first place—exposing the real question as whether the pilots were required to proceed to arbitration at all.

We therefore return to the union's argument that the pilots, in this situation, were obliged to go to arbitration because the Supreme Court has compelled the union to offer arbitration to protect agency shop employees' constitutional rights, and it would be inconsistent with that scheme to force the union to defend itself before both an arbitrator and a federal court. The necessary corollary to that argument is the union's asserted distinction of *Abrams* as limited to the NLRA.

To understand the union's rather intricate position, it is necessary to analyze the basis for and the implications

of the Supreme Court's determination in *Hudson* that a union representing public employees must offer nonmembers in an agency shop certain procedural protections to ensure that their First Amendment rights are not infringed. Previously, in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), the Court had held that, although public employers could establish agency shops in which all employees, whether union members or not, are required to pay their share of the union's collective bargaining costs, nonmember employees, in turn, were entitled to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234. *See also Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 118-19 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 769-70 (1961). In *Hudson*, the Court developed a set of requirements which would "protect[] the basic distinction drawn in *Abood*" and keep the agency shop from infringing on the First Amendment. *Hudson*, 475 U.S. at 302-03 & n.12. Specifically, *Hudson* obliges those unions to provide an adequate explanation for the basis of their fees (including the major categories of expenses and verification by an independent auditor), "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and an escrow account in which fees are placed pending resolution of any fee disputes. *Id.* at 307, n.18 & 310. Justice White, concurring for himself and Chief Justice Burger, suggested the very position the union urges on us. He said, "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Hudson*, 475 U.S. at 311 (White, J., concurring).

Although *Hudson*'s constitutional analysis was predicated on the premise that the union represented government workers and therefore its agency shop agreement with public employers' constituted "state action," the parties agree that the *Hudson* requirements similarly obtain vis-a-vis unions who negotiate agency shop agreements with private employers covered by the RLA. That is so because the Supreme Court in 1956 observed that the provision of the Railway Labor Act authorizing such agreements had to be read for constitutional reasons as limiting a union's ability to collect "dues . . . as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232, 238 (1956). The Constitution was thought implicated because agency shop agreements under the RLA carried the imprimatur of federal law. *Id.; see also Lancaster v. Air Line Pilots Ass'n Int'l*, 76 F.3d 1509, 1519 (10th Cir.1996); *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993).

What is hotly disputed, however, is whether the obligation to provide prompt review by an impartial decisionmaker, rooted as it is in the protection of constitutional rights, extends to unions who gain agency shop agreements under § 8(a)(3) of the NLRA. If it is not, then *Abrams*' refusal to force the telephone workers to go to arbitration is distinguishable, the union claims, because the union there was not obliged *constitutionally* to offer arbitration. We are therefore backed into one of the more troublesome issues in labor law today and on which the circuits seem split—what is the legal basis and nature of a union's obligations to agency shop employees under the NLRA. *Compare Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 927 F.2d 88, 92 (2d Cir.) (finding no state action in an NLRA case to implicate *Hudson*'s requirements), *cert. denied*, 502 U.S. 905

(1991), *with United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365 (6th Cir. 1994) (assuming that *Hudson*'s requirements apply in a case under the NLRA), *cert. denied*, 115 S. Ct. 1095 (1995).

As the union points out, however, this is not an entirely new question for us; we determined back in 1983 in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir.) (holding the denial of strike benefits to nonstriking, nonmembers not unconstitutional) that under the NLRA an agency shop agreement does not amount to state action. We distinguished the Supreme Court's decisions discerning state action under the Railway Labor Act because that statute not only authorizes agency shops—and therefore puts a federal imprimatur on a collective bargaining agreement forcing an unwilling employee to pay a union an agency fee—it also preempts state law. *Id.* at 476-77. The NLRA, by contrast, in § 14(b) provides an option by which state law may ban a union shop and override the federal scheme. On reflection, it is not apparent why it is any less "state action," meaning governmental action, if both the federal and state governments combine (when the state chooses not to ban union shops) to provide a legal regime whereby an employee who refuses to join a union is still obliged to pay an agency fee. Nevertheless, it is not open to us to depart from our prior holding.

Still, the Constitution's applicability to union shop clauses under the NLRA is not determinative as to the union's obligation to provide *Hudson* procedures to nonmembers. Subsequent to *Kolinske*, the Supreme Court decided the crucially important *Communication Workers v. Beck*, 487 U.S. 735 (1988), and although it declined to determine whether the Constitution had the same application to agency shop agreements under the NLRA as it does under the RLA, *id.* at 761, it did hold that the statutory authorization to operate union shops under § 8(a)(3) was coextensive with that under § 2, Eleventh

of the RLA. *Id.* at 752. Both statutes, similarly worded, permit unions to reach agreements with employers that compel employees to pay agency shop fees only to the extent that those fees are "necessary to finance collective bargaining activities." *Id.* at 759-62. Any greater exaction would violate the union's legal duty of fair representation. *Id.* at 742-43, 762-63. We see no reason why this statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty. We therefore do not believe it is possible to distinguish *Abrams* on the ground that the union's proposed arbitration of the dispute there was wholly voluntary. We recognized as much in *Abrams*, albeit in passing: "Although in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in '[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake.'" *Abrams*, 59 F.3d at 1379 n.7 (quoting *Hudson*, 475 U.S. at 306).

We do not think, then, that the union's attempted distinction of *Abrams* is persuasive, but to be fair, that case is not wholly dispositive because we were not faced with the argument that the union mounts here, which is based on Justice White's concurrence in *Hudson*. It is an argument that has found a mixed response: The circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on "exhaustion" before the dissident employees come to federal court. *Compare Lancaster v. Airline Pilots Ass'n Int'l*, 76 F.3d 1509, 1521-23 (10th Cir. 1996) (reading *Hudson*, including Justice White's concurrence, to require excusable exhaustion of arbitration to avoid the wasteful expenditure of time and money) *and Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.) (federal courts

should not review fee calculations at the notice stage because it would involve the courts in the micromanagement of fee calculation), *cert. denied*, 501 U.S. 1230 (1991), *with Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996) (criticizing the district court's opinion in the present case and holding that there is no exhaustion requirement), *cert. denied*, 65 U.S.L.W. 3457 (U.S. Jan. 6, 1997) (No. 96-429), *and Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992) (discussing the issue in dicta and reading *Hudson* as only requiring arbitration as an alternative, not a precursor, to litigation). We observed this division once before in *Beckett v. Airline Pilots Ass'n*, 995 F.2d 280, 285 (D.C. Cir. 1993), but we did not have to choose sides in that case. Here we do. Although we recognize that Justice White raised a legitimate *practical* concern directed at the quasi-legislative scheme that the majority adopted in *Hudson*, we simply see no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position.[1] We therefore align ourselves with the Sixth and Third Circuits in holding that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option.

That does not mean we are insensitive to the union's problem of defending its actions simultaneously in two separate fora. There is a rather strange relationship between the union and the dissenting pilots; it is certainly not the kind that gives rise to a continuing smooth recourse to an agreed-upon method of resolving disputes. But surely given the disincentives both sides face, it is not inconceivable that all the dissenting pilots could be

[1] Although the majority did not explicitly reject Justice White's concern, it did specify that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Hudson*, 475 U.S. at 308 n.21.

persuaded to agree to arbitration, perhaps if the pilots felt they had more say in the selection of the arbitrator and the rules governing the proceeding. It may well be, for instance, that the arbitrators chosen by the AAA from a group "experienced in labor matters" would not be perceived as typically sympathetic to such plaintiffs (or their counsel). The union may well entertain visceral objections to engaging in a kind of collective bargaining over dispute resolution procedures with the non-members, but practical concerns might well, as the union itself emphasizes, predominate.

Assuming, however, that the union faces continuous litigation in federal court, it does not follow that it will necessarily be obliged simultaneously to offer arbitration. *Hudson*, it should be remembered, did not require arbitration *per se*. Rather, it required a "reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 307. If unions are brought into federal court each year on agency fee challenges as ALPA fears, presumably the same district judge will hear those cases. To the extent the court gains familiarity with the union's procedures and practices, federal court decisions themselves may satisfy *Hudson*'s requirement if the proceedings move relatively quickly. The unions can also assist the courts in speeding up the process by making pre-trial concessions regarding discovery and other time-sensitive matters. The Court in *Hudson* seemed to recognize this very possibility when it noted that "[c]learly, . . . if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* at 308 n.20.

Effective use of the class action procedures may also minimize ALPA's concerns. Nonmembers may well elect to bring their claims as a class. *See, e.g., Abrams*, 59 F.3d at 1378; *Hudson*, 922 F.2d at 1308. A class consisting of all agency shop nonmembers can be certified to chal-

lenge the adequacy of a union's notice, *see Abrams*, 59 F.3d at 1378, and courts may also certify a class of nonmembers who have specifically objected to the exaction of fees without running afoul of the Supreme Court's decision in *Street*. *Id.*

In sum, we think the parties and their counsel may well be able to devise procedures that will provide dissenting pilots with their legal rights and yet not unduly burden the union.

III.

Although our decision sustaining appellants' right not to go to arbitration necessarily means this case must be remanded to the district court—the arbitrator's decision is no longer a part of the legal picture—there are certain issues presented by the parties that are straight questions of law and therefore should be decided now; there is no reason to remand. Perhaps the most important of those questions relates to ALPA's air safety "activities," which the union claims are germane to collective bargaining. The arbitrator and the district judge—apparently resting her decision on an independent legal analysis—agreed with the union. But the pilots claim that they are being charged in part with certain union activities that involve lobbying government agencies and, in accordance with *Hudson*'s reasoning, these activities cannot be considered germane to collective bargaining.

The union, although it objects to appellants' use of the term "lobbying," does not dispute that a portion of its expenses involves its contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety—which even includes intervention with the President and members of the Senate concerning appointments to the National Transportation Safety Board. ALPA contends, however, that its government relations activities are interconnected with those airline safety issues that animate much of its collec-

tive bargaining and therefore they should be regarded as germane to that bargaining.

There are major difficulties with the union's position. If there is any union expense that, given the logic of *Hudson* and its progeny, must be considered furthest removed from "germane" activities, it is that involving a union's political actions. After all, whether one considers the RLA's limitation on the union's use of nonmembers' compelled agency fees to be constitutionally required or inspired, it is nonetheless nonmembers' First Amendment-type interests that are protected. And it is hard to imagine those interests more clearly placed in jeopardy than when the union uses the dissidents' money to pursue political objectives. The union would have us see its lobbying on safety-related issues as somehow nonpolitical because all pilots share a common concern with these activities. But we cannot possibly assume that to be true. All pilots are surely interested in airline safety, but it would certainly not be unexpected that pilots would have varying views as to the desirability of governmental regulation—including those regulations of airlines that pertain to safety. The benefits of any regulation include trade-offs, and certain pilots might be reluctant to pay the costs either directly or indirectly of increased regulations, just as others might oppose relaxed regulations that could expand work opportunities. Some, of course, might even object to such regulations on principle.

That the subject of safety is taken up in collective bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as

germane union expenditures that touch the political world. *See Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring) (observing that the Supreme Court treats litigation as non-germane perhaps because it regards litigation as a continuation of the political process). *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (expenses are not germane to collective bargaining "at least in the private sector" if they involve political or ideological activities); *Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447-48 (1984); *Street*, 367 U.S. at 768.

To be sure, in *Lehnert* the Supreme Court recognized an exception to this principle for public sector unions because "[t]he dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one." 500 U.S. at 519-20. ALPA would have us extend this limited exception to this case because safety standards can be the result of either collective bargaining or government action and indeed, the latter may foreclose the former. But, as we have explained, that extension of the *Lehnert* exception would swallow the *Lehnert* rule. On remand, therefore, the district court should draw a line between safety-related collective bargaining expenditures and those relating to the union's government relations.

IV.

The pilots raise a number of additional claims, some of which can also be decided as a matter of law—others of which must be remanded. The 1990 and 1991 statements allegedly constituted inadequate notice under *Hudson* because they were not "audited"—even though the 1992 statement, under which fees were ultimately levied, was. We agree with ALPA that the pilots have failed to establish that they have standing to raise this claim, because the

pilots were not injured by the alleged inadequacy. They did not suffer as a result of inadequate information on which to base an objection because they did submit a timely objection. And ALPA rebated the difference plus interest, from an escrow account, between the amount of actual expenses in 1992 and the estimates from the 1990 and 1991 statements. A formally audited notice would have changed nothing because Price Waterhouse verified ALPA's accounting in 1990 and 1991, and the pilots have not alleged that a more formal audit would have produced a different collection of fees initially—they complain only that the 1992 fees were ultimately lower than the estimates made from 1990 and 1991.

ALPA also did not provide the pilots with "reasonably prompt" review, under the pilots' rationale, because their first opportunity to challenge the 1992 statement was in mid-1993, and they could not challenge the 1990 or 1991 statements earlier than that. We agree with ALPA that since the pilots did not request arbitration with respect to either the 1990 or 1991 statements, and since they have protested attending *any* arbitration before being allowed in court, they cannot now complain that the arbitration should have been available earlier. This problem will not recur in any event because the issue arose in this case only because the agency shop agreement did not take effect until 1992. In the future pilots can, if they wish, request arbitration in any given year of the prior year's statement, because that same statement will determine both their final agency fee for the preceding year and their tentative fee for the current year.

The pilots also contend that the district court erred in granting ALPA summary judgment on their challenge to the audit of the 1992 statement. The district court interpreted the pilots' claim to be that Price Waterhouse did not audit the "germane/nongermane calculation" nor "examine . . . [ALPA's] expenditures in each project code." The court reasoned that auditors need not make

the legal determination of whether an expense is germane. It further concluded, after reading the declaration of the pilots' expert, that the pilots conceded that Price Waterhouse's review "provid[ed] the assurance that sums allocated to project codes are actually expended in support of those codes." This was enough, in the district judge's view, to permit summary judgment for ALPA.

Insofar as the district court rejected the pilots' request that an auditor make legal determinations of whether expenses are germane or not germane, we agree. *See Dashielle v. Montgomery County*, 925 F.2d 750, 755 (4th Cir. 1991); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 682 n.3 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987). Irving Ross, appellants' expert, devoted most of the space in his declaration to criticizing Price Waterhouse's inadequate evaluation of whether expenses were properly treated by ALPA as germane and whether *Hudson* was satisfied. These are matters of law, not accounting, and we cannot expect accountants to conduct the analysis of whether an expense was necessarily or reasonably incurred as part of the union's collective bargaining duties. *Hudson* auditors are not different from other auditors whose "usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews*, 829 F.2d at 340. There is, therefore, nothing legally deficient with Price Waterhouse's reliance on the "definitions, significant factors, and management assumptions" made by ALPA in dividing its expenses between germane and nongarmane.

But the pilots claim that Ross also questioned whether Price Waterhouse violated generally accepted accounting principles in the *manner* by which it conducted the audit, and therefore his declaration created a factual dispute immune from summary judgment. The professional adequacy of the *Hudson* audit is certainly a proper subject

for review by a judge or an arbitrator. ALPA would have us hold that, in the absence of allegations of fraud or willful misconduct, a court or arbitration panel should not inquire whether the *Hudson* audit was properly performed. Although *Hudson* does not require that every underlying record and document be discoverable by objecting members' accounting experts, as Ross suggests, we disagree that the methodologly of the auditor may not be questioned for anything but fraud or intentional deception. *Hudson* did not stand for the proposition that a rubber stamp by an accountant stating "this was audited" meets the constitutional minimum it envisioned.

In that regard, we read Ross' declaration as creating a factual dispute over the adequacy of Price Waterhouse's audit, including, as the district court phrased it, the propriety of the "assurance that the sums allocated to project codes were actually expended in support of those codes." Ross challenged Price Waterhouse's methodology by noting that the audit itself was meant to assist a particular group of users—the nonmembers—in determining whether or not to object to the agency shop fee. Under the particular form of audit selected by Price Waterhouse,[2] the auditor is advised:

> When expressing an opinion on one or more specific elements, accounts, or items of a financial statement, the auditor should plan and perform the audit and prepare his or her plan report with a view to the purpose of the engagement.

Ross contended that Price Waterhouse planned and performed the audit in a manner contrary to the needs of its users and therefore below auditing standards. Ross then focused on several particular aspects of the audit as defi-

[2] Price Waterhouse conducted the statement audit in accordance with "SAS-62, the Statement of Auditing Standards 62 Special Reports," which was issued by the Accounting Principles Board, the senior technical body of the American Institute of Certified Public Accountants.

cient under generally accepted auditing standards. He criticized, for example, the sample size of paychecks evaluated by Price Waterhouse (24 to be exact) as "unacceptably small" for a $26 million payroll. He also chastised Price Waterhouse for its failure to contact those 24 employees directly to determine what work they did (which could then be compared to the allocation of their time to project codes) and for the auditors' similar treatment of non-payroll disbursement. Out of 31,000 non-payroll disbursements, Price Waterhouse investigated 116—a number he claimed "too few" for an audit of this kind.

This is not to suggest that all of Ross' criticisms raise factual issues—for as we said, the allocation of expenses into germane and nongermane categories is not a matter that an accountant can "audit." An auditor can certainly verify that money claimed to be spent was actually expended on the particular activity claimed, but he need not —nor do we see how he could—evaluate and characterize the nature of the activity itself for purposes of applying the RLA. For that reason, we remand for the district court's consideration appellants' claim that the methodology failed to comply with generally accepted auditing principles.

The pilots' related attack on ALPA's recordkeeping of germane and nongermane expenditures, including its treatment of "overhead" expenses, is properly leveled not on the audit, but on ALPA's adequacy of proof. The "union bears the burden of proving the proportion of chargeable expenses to total expenses." *Lehnert*, 500 U.S. at 524. The pilots contend that "ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable" to meet this burden. They also challenge ALPA's "germane" categorization of administrative expenses, which support all of the union's activities, such as rent, administrative salaries, equipment maintenance, and general supplies. The district court relied on the arbitrator's findings of fact and held that ALPA had

provided enough detail about its calculations to meet *Hudson*'s requirements. In light of our holding above that the pilots were not required to exhaust arbitration, we reverse and remand for the district court to reach independent factual findings.

This, of course, raises the question of what records ALPA must provide to the pilots in discovery so that they may challenge ALPA's assertion that the expenses were properly charged. The pilots obviously need some minimal level of access, *see Bromley*, 82 F.3d at 696, but it is equally clear that *Hudson* did not ordain a sweeping inquiry into all of ALPA's receipts. *See Hudson*, 475 U.S. at 307 n.18. We leave discovery management to the district court, but some sort of sampling technique might well provide the appropriate balance between the nonmembers' interest in data that is accessible and informative and the union's concerns that the request be manageable. It is just as inadequate for the union to force nonmembers to plough through an entire warehouse of receipts without organizing the information in some fashion as it is for the union to supply nothing at all. It is the district court's responsibility to decide the appropriate middle ground between the two extremes.

[Filed Aug. 30, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs, 153 nonunion pilots employed by Delta Air Lines, bring this action pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1988), to challenge the agency shop fees charged to them by the union, defendant Air Line Pilots Association ("ALPA"), for the year 1992. This matter is presently before the Court on the motion of ALPA for summary judgment on plaintiffs' seventh cause of action, the one remaining count in this case. Plaintiffs' seventh cause of action alleges that portions of the 1992 agency shop fees were used for purposes not germane to collective bargaining.

An arbitration was held in this matter in early 1994. In his Opinion & Award, the arbitrator found that the challengers were entitled to a reduction in the amount of agency shop fees they paid for 1992 because certain payments were not germane to collective bargaining. He determined that 158 nonunion pilots were proper parties to the arbitration and thus were entitled to the fee adjustment. Out of those 158 pilots, 91 intervened in the present lawsuit or, in the case of Robert A. Miller, Kenneth

Shakelford, and Robert V. Ziminsky, already were plaintiffs. Those 91 pilots seek a trial *de novo* on the proper calculation of expenses that are germane and nongermane to collective bargaining. The other parties to the arbitration, 67 nonunion pilots, have not challenged the arbitrator's award. In addition to the 91 pilots who were parties to the arbitration, 62 nonunion pilots who were *not* parties to the arbitration have intervened in this case, also seeking a trial on the proper calculation of the 1992 agency shop fees.

One of the main issues before the Court at this point in the litigation is the effect of the arbitration, a procedure mandated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986), on the present lawsuit. Also before the Court is the question of whether the union can require nonunion members to submit to *Hudson*-type arbitration before bringing a suit in federal court. Upon consideration of ALPA's motion for summary judgment, the memoranda in support thereof and in opposition thereto, the entitre record herein, including the record of the arbitration, and the oral argument of counsel at a hearing on this matter, the Court will defer to the findings of fact of the arbitrator unless those findings are clearly erroneous, and will review *de novo* the arbitrator's legal conclusions. Finding no errors with the decision and award of the arbitrator, the Court grants ALPA's motion for summary judgment.

I.

ALPA's written "Policies and Procedures Applicable to Agency Fees" provide that, at the end of every year, ALPA must determine which expenditures are germane and which expenditures are not germane to collective bargaining, and report those expenditures in a "Statement of Germane and Nongermane Expenses" ("SGNE"). ALPA creates the SGNE by dividing its project codes into germane and nongermane categories, and then calculating

the amount spent on each code. ALPA's 1992 SGNE [1] includes six pages of notes to explain the expenditures and a 22-page "breakdown of germane and nongermane expenses by project." Arb. Ex. 11. The parties dispute the exact date that ALPA issued the 1992 SGNE, but it appears that ALPA issued the SGNE in mid-1993, at least a year after plaintiffs filed this lawsuit.

A number of pilots challenged the 1992 SGNE and requested arbitration under ALPA's policies and procedures. Included among the challengers were the four original nonunion plaintiffs in this case. On January 21, 1994, plaintiffs filed a motion in this Court for a preliminary injunction, seeking to enjoin the arbitration proceedings, which were scheduled to begin on January 24, 1994. The Court denied the motion. An arbitrator from the American Arbitration Association ("AAA") held three days of hearings in January, February, and March 1994, and issued his Opinion and Award on August 10, 1994. According to the arbitrator's opinion, 174 pilots initially

[1] The 1992 SGNE figures are:

Germane expenses:		
Negotiations	$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	55,559,797	81.00%
Nongermane expenses:		
Litigation	$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	13,035,531	19.00%
Total expenses:	$68,595,328	100.00%

requested arbitration of the agency fee. Thereafter, a number of challengers indicated that they wished to withdraw from the arbitration in order to join in the present litigation in federal court. Plaintiffs' counsel attended the arbitration and entered his "conditional" appearance for a number of pilots who had previously written letters of withdrawal. Plaintiffs' counsel, along with ALPA's counsel, was given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments.

Taking the expenses as claimed and audited, the arbitrator reviewed the allocation of germane and nongermane expenses in the 1992 SGNE. *See* Arb. Award at 18. The arbitrator determined that certain expenses that had been charged as germane actually were not germane. The arbitrator directed ALPA to recompute the agency fee charged to nonunion members by subtracting payments to International Federation of Air Line Pilots ("IFALPA") and International Transport Workers ("ITW"), expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs. Aside from those categories, the arbitrator found that ALPA's computation of germane and nongermane expenses in its 1992 SGNE was supported by the evidence and applicable Court decisions, such as *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295 (4th Cir. 1993) (en banc); and *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991).

Specifically, the arbitrator rejected the challengers' claim that an expenditure may not be allowed as a germane expense without a detailed explanation of *every* claimed expenditure. The arbitrator found that ALPA had provided ample detail to justify its expenditures

through project listing and explanations of the nature of the expenditures. Moving on to the merits, the arbitrator found that all expenses related to the Major Contingency Fund ("MCF") for 1992 were germane and properly charged to non-member agency fee payers. Next, he found that ALPA's costs relating to air safety activities were germane expenses, especially in light of the Supreme Court's decision in *Lehnert*. The arbitrator found that rent charges, including utilities, were allocated to specific project codes which were then separated into germane and nongermane expenses, so those charges were appropriately classified. The arbitrator found that expenses such as salaries, other expenses of officers and employees, and costs of facilities and equipment were germane. Finally, the arbitrator rejected the argument of the Delta pilots that they should be charged only for those expenses that were related to the negotiation of the Delta contract and the cost of servicing that contract. The total amount of expenses reallocated from germane to nongermane was $300,224, equal to .004% of the total of all expenses. *See* Supp. Arb. Opinion at 3.

II.

At issue in the present case is to what extent, if any, the Court may defer to the factual findings of the arbitrator. Although the Supreme Court has held that the union is required to provide arbitration procedures in RLA agency shop disputes, it is not clear what effect an arbitration award has on subsequent or concurrent litigation. The RLA does not mention a duty of the union to provide arbitration or a duty of the nonunion challengers to exhaust arbitration before bringing a suit in federal court to challenge agency shop fees. The duty of the union to provide arbitration was created by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), where the Supreme Court listed arbitration as a procedural safeguard that the union

must provide when subjecting nonmembers to agency shop fees. The exact language is that the union must "provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307. In the process of establishing a procedure for these types of cases to be resolved through arbitration, the *Hudson* Court noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [legal] action." *Hudson,* 475 U.S. at 308, n.21. It is thus clear that the arbitration does not have preclusive effect, but the Supreme Court has not given the district courts any guidance about how much they may defer to the arbitrator's findings. Justice White was the only justice in *Hudson* to comment on the issue, noting in his concurrence:

> [A]s I understand the Court's opinion, the complaining nonmember need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

Hudson, 475 U.S. at 331.

After the Supreme Court's ruling in *Hudson,* the case eventually returned to the 7th Circuit Court of Appeals. *Hudson v. Chicago Teachers Union, Local No. 1,* 922 F.2d 1306, 1314 (7th Cir.), *cert. denied,* 501 U.S. 1230 (1991). In that later proceeding, the 7th Circuit discussed the arbitration process:

> Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts. . . . Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the

> requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

Id. at 1314.

The Court of Appeals for this Circuit has noted the exhaustion issue without deciding it in two recent cases, *Beckett v. Air Line Pilots Assn.,* 995 F.2d 280, 285 (D.C. Cir. 1993) and *Beckett v. Air Line Pilots Assn.,* No. 94-7130, 1995 U.S. App. Lexis 17476 (D.C. Cir., July 18, 1995). In the first *Beckett* case, the Court of Appeals noted that this issue has created a circuit split:

> We begin by noting the theories in this case that we need *not* reach. . . . [W]e would have to decide whether appellants must arbitrate this issue [whether the RLA prohibits ALPA from requiring non-union pilots to help pay for a union strike in another bargaining unit] before filing suit. There is a split in the circuits on this question. *Compare Hudson v. Chicago Teachers Union, Local No. 1,* 922 F.2d 1306, 1314 (7th Cir.) (holding that non-union members must arbitrate disputes over calculation of agency shop fee), *cert. denied,* —— U.S. ——, 111 S. Ct. 2852, 115 L.Ed.2d 1020 (1991), *with Tierney v. City of Toledo,* 917 F.2d 927, 940 (6th Cir. 1990) (requiring union to remove exhaustion requirement

> from its arbitration procedures for contesting calculation of agency shop fee).

Beckett I, 995 F.2d at 284-85. In the second *Beckett* case, ALPA again raised the exhaustion issue. The Court of Appeals noted in a footnote:

> ALPA similarly contends the pilots should have exhausted their contractual remedy of arbitration before challenging the assessments in court. *See* App. 67-70. While this position may have merit, to remand for arbitration at this late stage would only yield futile swink. *See Pilots Against Illegal Dues v. ALPA*, 938 F.2d 1123, 1133 (10th Cir. 1991) (concluding "[i]t would be redundant at this point . . . to order the matter to be submitted to an arbitrator.").

Beckett II, slip op. at 5.

Only one case is clearly on point with respect to the exhaustion issue, *Bromley v. Michigan Education Association-NEA*, 843 F. Supp. 1147 (E.D. Mich. 1994), *appeal pending*, Nos. 94-1164, 94-1210 (6th Cir.). In *Bromley*, as in the present case, a *Hudson*-type arbitration was held and an Arbitration Opinion and Award issued before the issues at the federal district court became ripe for disposition. The *Bromley* plaintiffs argued that the determinations of the arbitrator could be "virtually ignored," while the defendants maintained that the trial court could and should defer to the factual findings of the arbitrator. After considering the arguments of the parties, the court held, "[u]nless the arbitration award is to have a significant impact in subsequent judicial proceedings, the procedure spawned by the Supreme Court is largely a waste of time and money. . . . [I]t is the opinion of the Court that it is desirable and consistent with developing case law to give as much deference to

the arbitration award as is consistent with the mandate of § 1983."[2] *Bromley*, 843 F. Supp. at 1153-54.

ALPA claims that an exhaustion requirement is implicit in the *Hudson* decision, meaning that those 62 plaintiffs who failed to bring their claims to arbitration should be barred from litigation or, alternatively, bound by the arbitrator's decision.[3] ALPA asks the Court to take the role of reviewing the decision of the arbitrator, and not to hold a trial *de novo*. ALPA recommends that the Court use the "clearly erroneous" standard of review for the arbitrator's fact-finding, and review *de novo* the arbitrator's rulings on the law.

Plaintiffs, however, claim that the union has no power under the RLA to require nonmembers to exhaust arbitration remedies. Plaintiffs argue that the Court cannot review or defer to the arbitrator's decision, but must hold a trial *de novo*. The nonunion members note that they never agreed by contract to be bound by a duty to arbitrate. The Court is aware of the principle that parties can be forced to arbitrate a grievance only if they have entered into a contract requiring that sort of dispute resolution. *See AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974). In the present case, the nonunion plaintiffs did not have a contractual relationship with ALPA because they were not members of the union. Moreover, ALPA's agency shop rules—which mandate certain procedures that ALPA nonmembers must follow—use the permissive "may" instead of the mandatory "shall" when describing the pilots' duty to arbitrate.

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[2] The plaintiffs in *Bromley*, like *Hudson*, were public school teachers, so the case was brought under 42 U.S.C. § 1983 (1988).

[3] ALPA acknowledges that if those 62 plaintiffs are not foreclosed from bringing their claims before this court, they would be entitled to receive the fee adjustments ordered by the arbitrator.

Yet it is not unprecedented for courts to require exhaustion of arbitration remedies as a matter of judicial discretion. For example, although the Employee Retirement Income Security Act ("ERISA") itself does not require the exhaustion of remedies available under pension plans, courts have required exhaustion as a matter of judicial discretion. *See Communications Workers of America v. AT&T*, 40 F.3d 426, 431-32 (D.C. Cir. 1994). As support for this judicially created requirement, the Court of Appeals for the D.C. Circuit cited factors such as preventing premature judicial interference with a pension plan's decision-making, and the prospect that the exhaustion requirement may render subsequent judicial review unnecessary because claims may be resolved by the earlier proceeding. *Id.* at 432.

The Court deems the exhaustion issue in the present case to be much like the issue in *Communications Workers* in that, although the RLA itself does not require the exhaustion of arbitration remedies and there is no contractual relationship between the parties, the Court must consider objectives such as preventing premature judicial intervention and giving relevance to the arbitral proceedings that were mandated by the Supreme Court in *Hudson*. The Court concludes that the procedures established in *Hudson* by which nonunion members may challenge agency shop fees require, in the words of Justice White, that "if the union provides for arbitration . . . it should be entitled to insist that the arbitration procedure be exhausted before [the challengers may] resort[] to the courts." *Hudson*, 475 U.S. at 331.

The Court rejects plaintiffs' argument that the language in *Hudson*, "[t]he arbitrator's decision would not receive preclusive effect in any subsequent . . . litigation," prevents the Court from reviewing the decision of the arbitrator and mandates that the Court hold a *de novo* trial on the same issues covered in the arbitration. Plaintiffs cite *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-

56 (1974), in support of their position. *Alexander*, however, was a Title VII employment discrimination case, not a labor dispute. In that case, the Court concluded that an employee could pursue a discrimination claim in both arbitral and judicial forums because "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*." *Id.* at 59-60. Title VII litigation differs dramatically from the present RLA case, however. Because the Supreme Court itself has established the arbitration procedure in RLA cases, the Court determines that the principles set forth in *Alexander v. Gardner-Denver Co.* for Title VII suits do not apply to the present situation. The federal courts reviewing Title VII administrative proceedings before the *Alexander* decision did not have a Supreme Court mandate of arbitration. The Court agrees with ALPA that it would be pointless and unreasonable for the Supreme Court to require unions to establish arbitration procedures and then permit employees to ignore those procedures and bring their claims directly to federal court.

The Court will adopt ALPA's suggestion that it review the fact-finding of the arbitrator according to the "clearly erroneous" standard, the standard by which district courts review the findings of masters. *See* Fed. R. Civ. P. 53(e)(2). The Court will review *de novo* all legal issues. The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials

every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

As mentioned above, 62 of the plaintiffs were not parties to the arbitration. Those plaintiffs have made no showing that the arbitration would have been any different if they had been present. ALPA has agreed to give them the same rebate that was given to the 158 pilots who did arbitrate. In concluding that the scheme set forth in *Hudson* allows the union to require challengers to the agency shop fee to arbitrate the dispute before bringing a claim in federal court, the Court applies the decision of the arbitrator to those pilots.[4]

III.

Plaintiffs allege that ALPA did not properly calculated its germane and nongermane expenses in its 1992 Statement of Germane and Nongermane Expenses ("SGNE"). Plaintiffs do not dispute the following characterization ot their arguments in this cause of action:

1. That ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof;
2. That ALPA is required to, but did not, determine germane costs on an airline-by-airline basis;
3. That ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF");

[4] If anything, the Court is granting certain of those pilots more relief than they reasonably could expect—the record shows that some of those pilots were not parties to the arbitration because they failed to file an objection with the union within the allotted time period. After failing to file an objection with the union, thus barring their attendance at arbitartion, those pilots intervened in the present lawsuit.

4. That ALPA has not properly allocated "indirect" or "overhead" costs;
5. That ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining.

See ALPA's Mem. in Supp. Mot. Summ. J. at 21; Pls.' Oppn. to ALPA's Mot. Summ. J. at 29. The burden of proof is on ALPA to prove that its calculation of germane/nongermane expenses is proper. "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40, n.40 (1977), quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).

The Court will address each of the plaintiffs' arguments in turn:

1. Plaintiffs allege that ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof. The arbitrator concluded, after a review of the evidence submitted by both sides, that the SGNE "does contain sufficient information to permit an intelligent appraisal of the nature of the expenses and the project for which they were expended." Arb. Award at 15. The arbitrator examined the way in which ALPA tracks its expenses, which is by allocating each expense to a particular project code. ALPA's system has over 1,200 such project codes. *See* Arb. Award at 10. The arbitrator found that "[t]he expenses are charged both to a natural cost category and to a project code, per the testimony and report of the auditing firm. Employee wages and benefit costs are allocated to specific projects based on time records.

Rental records allocate cost to the project based on square footage used." Arb. Award at 10. The projects are allocated as germane or nongermane based on the nature of the project, which is determined by a review of the project function by ALPA's Legal Department and the Director of Finance. The project system has existed since 1986. The audit statement, reviewed and quoted at length in the arbitrator's opinion, further discussed the methodology by which ALPA categorizes its expenses as germane or nongermane. *See* Arb. Award at 11-14. The arbitrator concluded:

> The items are sufficiently identified so that at the hearing the arbitrator and the Challenger's counsel were able to make appropriate inquiry regarding the nature of the expense. . . . The SGNE contains detailed project expenditures under broad categories of negotiations, grievances, general administration, union administration, litigation, legislation, publications, organizing, insurance, charity and per capita payments. It permits questions regarding safety items that are identified; it permits inquiry regarding expenditure on TWA-Icahn expenditures; and various categorized office expenses. Based on all of the above, we find that the SGNE meets all the criteria as a report of expenses categorized as germane and nongermane.

Arb. Award at 15-16. The Supreme Court in *Hudson* held that the union is required to provide nonmembers with adequate information about the basis for the proportionate share, *see Hudson*, 475 U.S. at 306, but also noted:

> We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." [citations omitted]. Thus, for instance, the Union cannot be faulted for calculating its fee

> on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Hudson, 475 U.S. at 292 n.18. The Court determines, upon review of the record, that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and concludes as a matter of law that ALPA provided enough detail about its calculation of germane and nongermane expenditures to satisfy the requirements of *Hudson*.

2. Plaintiffs allege that ALPA is required to, but did not, determine germane costs on an airline-by-airline basis. This argument merits little discussion because the decision of the Supreme Court in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519-24 (1991), as well as the decisions of two Courts of Appeals, *Crawford v. Air Line Pilots Assn.*, 922 F.2d 1295 (4th Cir.), *cert. denied*, 114 S. Ct. 3249 (1993); *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991), mandates that the argument must fail. The Supreme Court rejected a similar argument in *Lehnert*, stating, "[w]e therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." ALPA has carried its burden of proving the proportion of chargeable expenses because, as the arbitrator stated, "we find that ALPA[ ] operates as a unified Union where each contract has some affect on all carriers, albeit not a direct measurable impact, and that therefor[ ] no basis exists for establishing a unit by unit system of charges." Arb. Award at 38. The Court determines, upon review

of the record, that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and concludes as a matter of law that ALPA need not determine germane costs on an airline-by-airline basis.

3. Plaintiffs allege that ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF"). ALPA maintains the MCF for the purpose of having the ability to support a strike affecting one or more carriers which employ its members. *See* Arb. Award at 19. ALPA raises money for the fund by collecting from members and nonmembers a percentage of their wages as a contribution. According to ALPA's constitution, the payments to the MCF should be suspended when the fund reaches $50 million. Plaintiffs allege that ALPA has been using surplus MCF funds as a "loan" to the union, spending that money on general expenses in violation of the union's constitution. Citing *Crawford v. Air Line Pilots Association*, 992 F.2d 1295 (4th Cir. 1993), the arbitrator rejected the challengers' argument that the MCF was not chargeable to nonunion members. Addressing the same facts as in the present case, the Fourth Circuit held:

> Accordingly, applying the test enunciated by the Court in *Lehnert*, we hold that a pro rata share of strike support benefits for pilots in other bargaining units and of the pro rata cost of the major contingency fund may be charged to objecting agency-fee payers. *Accord Pilots Against Illegal Dues v. Airline Pilots Ass'n.*, 938 F.2d 1123, 1131 (10th Cir. 1991).

Crawford, 992 F.2d at 1301. The Court agrees that *Crawford* is dispositive of the issue of the right of ALPA to charge nonunion members for the maintenance of the MCF, and, accordingly, rejects plaintiffs' argument with respect to this issue.

4. Plaintiffs allege that ALPA has not properly allocated "indirect" or "overhead" costs. ALPA treats such

"indirect" or "overhead" costs the same as any other cost —they are allocated by project; the projects are separated into germane and nongermane expenses. Arb. Award at 36. The Court concludes as a matter of law that ALPA has met its burden of proving that such costs have been properly allocated as germane or nongermane expenses according to the standards set forth in *Lehnert* that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Aside from the expenses that the arbitrator reallocated, *see* Arb. Award at 39, the arbitrator found that the "indirect" or "overhead" expenses that were charged to the nonunion members were germane to collective bargaining. The Court concludes that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and that ALPA's allocation of "indirect" or "overhead" costs satisfies the standards set forth by the Supreme Court.

5. Plaintiffs allege that ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining. Their main argument with respect to air safety is that, because ALPA's safety activities involve contacts with the FAA and other government entities, charging nonmembers for such activities is impermissible. After a lengthy review of the facts and the law related to this issue, the arbitrator concluded that ALPA's "expenditures for safety committees and safety activities involving various problems faced by the pilot[s] represented by ALPA, are properly charged as a germane expense." Arb. Award at 33; *see id.* at 23-33. The arbitrator examined ALPA's "Air Safety Manual" and considered the testimony of ALPA's Assistant Director in the Representation Department, who has been involved in the administration of collective bargaining agreements. The record shows that ALPA's role in air safety includes accident in-

vestigation, the representation of pilots in grievances before the FAA, involvement in local and regional air safety committees, and other activities designed to promote safety. The arbitrator found that:

> There is no doubt that the Union's investigation of accidents serves a public good, even if it supplements the Federal government's official investigation. There is no question that committees considering air traffic control procedures, aircraft airworthiness, airport standards, all weather flying, hazardous materials, CHIPS [Charting and Instrument Procedures], human performance, aviation weather and ground deicing, among others, which may supplement Federal regulatory studies and efforts and carrier studies and efforts, are most beneficial to the pilots represented by the Union, as well as all of the public. The Union's role in establishing local, regional, and national air safety groups and in providing a system for pilots to report safety problems, is most desirable as a funtion of a professional organization and for the public, in general.

Arb. Award at 25. ALPA's collective bargaining agreement with the Delta pilots includes safety-related provisions.

Because the air safety costs are not directly related to ALPA's representational duties, the Court must apply the standards set forth in *Lehnert* to determine if those costs are properly chargeable to the union nonmembers. The Court concludes as a matter of law that ALPA has met its burden of proving that the air safety costs have been properly allocated as germane expenses. Such expenditures are germane to collective-bargaining activity because they are a subject of the collective bargaining agreement. Safety expenditures are justified by the government's vital policy interest in labor peace and avoiding 'free riders.' Finally, safety expenditures do not significantly add to the burdening of free speech. *See*

Lehnert, 500 U.S. at 519. The air safety expenditures are not being used for a political purpose simply because ALPA has some dealings with the federal government. The Court can find no constitutional grounds by which a nonmember could object to being charged for safety costs.

Having addressed plaintiffs' arguments that ALPA did not properly calculated its germane and nongermane expenses in its 1992 SGNE, having reviewed the record and determined that the arbitrator made no clearly erroneous findings of fact, and having reviewed all legal issues *de novo*, the Court concludes that ALPA is entitled to judgment as a matter of law. ALPA's motion for summary judgment will be granted. An appropriate Order will issue.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

Dated: August 30, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants.

ORDER

Before the Court is the motion of defendant Air Line Pilots Association ("ALPA") for summary judgment on plaintiffs' seventh cause of action, the one remaining count in this case, alleging that portions of the 1992 agency shop fees were used for purposes not germane to collective bargaining. The Court has considered the motion, the memoranda in support of and in opposition to the motion, the oral argument of counsel at a hearing on this matter, and the entire record herein. Having reviewed all legal issues *de novo* and having determined that the arbitrator made no clearly erroneous findings of fact, it is this 30th day of August, 1995,

ORDERED that the motion of ALPA for summary judgment be, and hereby is, granted.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

[Filed Jan. 24, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, *et al.*,
Defendants.

ORDER

Before the Court is the motion of plaintiffs, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the Judgment in this action. Plaintiffs move the Court to amend the Memorandum Opinions and Orders filed January 24, 1994, April 28, 1995, and August 30, 1995. By those Orders, the Court denied an injunction requested by plaintiffs and entered summary judgment in favor of defendant, Air Line Pilots Association ("ALPA").

A Rule 59(e) motion to reconsider is not a vehicle for raising facts and theories upon which a court has already ruled. Such a motion " 'must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions.' " *Assassination Archives and Research Center v. United States Dept. of Justice*, 828 F. Supp. 100, 102 (D.D.C. 1993) (quoting *Mississippi Assn. of Coops. v. Farmers' Home Admin.*, 139 F.R.D. 542, 546 (D.D.C. 1991)). Only if the moving party presents new facts or a clear error of law which "compel" a change in the court's ruling will the motion to recon-

sider be granted. *State of New York v. United States*, 880 F. Supp. 37, 39 (D.D.C. 1995).

As the basis for their motion, plaintiffs erroneously assert that, at the time of its final Opinion and Order, the Court was unaware of the decision of the Court of Appeals for this Circuit in *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995). Plaintiffs also erroneously assert that *Beckett v. ALPA*, 59 F.3d 1276 (D.C. Cir. 1995), constitutes an intervening change of the controlling law.

The decision in *Beckett* was issued on July 18, 1995. On July 19, 1995, the Court invited the parties to file supplemental briefs discussing the impact of *Beckett* on the present case. The decision in *Abrams* was issued on July 21, 1995. The Court was well aware of that decision and carefully considered the impact of *Abrams* on the present case. In its supplemental brief filed July 28, 1995, defendant ALPA discussed the impact of *Abrams* on the present case. The Court agreed with ALPA's conclusion that the decision in *Abrams* was not relevant to the issues before this Court, and thus did not mention *Abrams* in the August 30, 1995, Opinion. In plaintiffs' present motion, plaintiffs' counsel claims that he was unaware of the *Abrams* decision until after August 30, 1995. ALPA responds that *Abrams* was discussed in ALPA's supplemental brief filed July 28, 1995, so counsel should have been aware of it. Plaintiffs' counsel replies that he "had no further briefing opportunity prior to the decision in this case" in which to discuss *Abrams*. The record indicates, however, that plaintiffs' counsel had an opportunity to discuss *Abrams* in the supplemental brief he filed on July 28, 1995, seven days after the *Abrams* decision was issued and one month before the Court's final Opinion and Order of August 30, 1995. The record further shows that plaintiffs' counsel failed to request an opportunity to respond to ALPA's discussion of *Abrams*. At that point in the litigation, the Court,

recognizing the complexity of the motion for summary judgment, had already issued one lengthy Memorandum Opinion, twice requested supplemental briefing on the issues raised in the motion, and had heard the oral argument of counsel for both sides. Plaintiffs' counsel clearly could have requested at any time throughout the month of August that the Court consider his interpretation of a recent appellate decision.

Neither *Abrams* nor *Beckett* constitutes an intervening change in controlling law. As plaintiffs have presented no clear error of law to correct and no "manifest injustice" to prevent by granting the motion to reconsider, *see Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 705 F. Supp. 698, 702 (D.D.C. 1989), it is this 24th day of January, 1996,

ORDERED that plaintiffs' motion, brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, be, and hereby is, denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

[Filed Apr. 28, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,
Plaintiffs,
v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs, 154 nonunion pilots and one union pilot employed by defendant Delta Air Lines ("Delta"), brought this action to challenge an "agency shop" agreement entered into by Delta and defendant Air Line Pilots Association ("ALPA") on November 1, 1991. ALPA, a labor organization, is the exclusive collective bargaining representative of the pilots employed by Delta and numerous other airlines. Currently pending before the Court is the motion of ALPA for summary judgment. Upon consideration of the motion of ALPA, the supporting and opposing memoranda, the entire record herein, including the record of the arbitration and the arbitrator's Opinion and Award, and for the reasons outlined below, the Court will grant ALPA's motion for summary judgment in part and order further briefing on the issue of the impact of the arbitration on the issues in plaintiffs' seventh cause of action.

ALPA has represented Delta pilots for several decades. In 1972, ALPA and Delta entered into an agency shop agreement, which was rescinded in 1973 through a "secret ballot" of Delta union pilots. Delta did not enter into another agency shop agreement until November 1, 1991; at that time, Delta and ALPA negotiated the "contract maintenance" agreement (hereinafter "Supplemental

Agreement") that is at issue in this case. Section 27 of the Supplemental Agreement, the agency shop provision, requires all pilots who do not choose to become or remain members of ALPA to pay a "service charge" to ALPA.[1]

In December 1991, four nonunion pilots and one union pilot filed this lawsuit, seeking declaratory and injunctive relief to prevent implementation of the Supplemental Agreement. The Court ruled on cross-motions for summary judgment on August 2, 1993, granting summary judgment for ALPA on four counts of the complaint and denying summary judgment without prejudice as to the three remaining counts. The Court also granted plaintiffs' motion to amend the complaint and reopen discovery. The Court subsequently denied plaintiffs' motion for class certification but allowed 151 nonunion Delta pilots to intervene in the litigation.

At this stage in the litigation, five claims under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1989) remain:

1. First & Third Causes of Action (Lack of Authority to Enter into Agreement, Denial of Future Voting Rights):

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[1] Section 27 provides:

> 1. Each pilot of the Company covered by this Agreement who fails to voluntarily acquire and maintain membership in the Association, shall be required, as a condition of continued employment, beginning sixty (60) days after the effective date of this Agreement or the completion of his probationary period, whichever is later, to pay to the Association each month a service charge as a contribution for the administration of this Agreement and the representation of such employee. The service charge shall be an amount equal to the Association's regular and usual dues and including MEC assessments. In calculation of each non-member's monthly obligation, the Association shall allocate and adjust charges in the same manner as if followed with respect to its members.

Supplemental Agreement § 27, Ex. 1 to Pls.' Compl.

Plaintiffs allege that Delta and ALPA entered into a secret oral agreement to prevent a campaign in opposition to a union vote on the issue of whether to maintain the agency shop provision; they further allege that the secret agreement was not disclosed to the Master Executive Counsel ("MEC") as required under the Union Constitution and that the secret agreement denied Delta pilots future voting rights. Amendment to Complaint at VI, VII;

2. Fourth Cause of Action (Impermissible Collection of Moneys for Non-Germane Expenses):

   Plaintiffs allege that the Supplemental Agreement does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for union activities that are not germane to collective bargaining. Complaint at VIII;

3. Sixth Cause of Action (Illegal Grievance Procedure):

   Plaintiffs allege that the grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for purposes not germane to collective bargaining. Complaint at X;

4. Seventh Cause of Action (Non-Germane Expenditures):

   Plaintiffs allege that ALPA failed to conduct an 'independent audit" of ALPA's annual allocation of its expenditures as germane or nongermane to collective bargaining. Amendment to Complaint at XI; and

5. Seventh Cause of Action (Non-Germane Expenditures):

   Plaintiffs allege that portions of fees paid by nonmember pilots in 1992 under the Supplemental Agreement were used for purposes not germane to collective bargaining. Complaint at XI.

II.

Labor-management relations in the airline industry are governed by the RLA, 45 U.S.C. §§ 151-188 (1988). In 1951, Congress amended the RLA to permit employers and unions to execute "agency shop agreements," which would require union-represented employees who chose not to be union members to contribute financially to the union for its collective bargaining activities on their behalf. *See* 45 U.S.C. § 152, Eleventh. The purpose of the amendment, which ended a long-standing RLA ban on union security agreements, was to eliminate the "free-rider" problem caused by union nonmembers benefitting from the collective bargaining activities of the union. *See International Assn. of Machinists v. Street*, 367 U.S. 740 (1961). Out of concern for the free speech rights of dissenting employees, the Supreme Court has interpreted § 152, Eleventh to include a limitation on the union's power to use agency shop fees: the union cannot collect from dissenting employees any money for the support of "ideological causes not germane to its duties as collective bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984). In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court established procedures for a union to follow when collecting agency shop fees in order to avoid the Constitutional concerns expressed in its prior cases.[2] The Court stated:

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[2] Although *Hudson* dealt with a public employer and public employees, it is generally recognized that the *Hudson* requirements apply to the airline industry's collective bargaining agreements. *See Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295, 1301 (4th Cir. 1993) (citing *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 232 (1956)).

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson, 475 U.S. at 310. Most recently, the Supreme Court again addressed agency shop fees in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), ruling on what guidelines are to be followed in making the germane/nongermane determination.

III.

Under Rule 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *see also Washington Post Co. v. United States Dept. of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989). Rule 56 requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits, depositions or other competent evidence setting forth specific facts showing that

there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). The non-moving party is required to provide evidence that would permit a reasonable factfinder to find in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

1. First & Third Causes of Action (Lack of Authority to Enter into Agreement, Denial of Future Voting Rights):

Plaintiffs allege that ALPA and Delta entered into a secret oral agreement that Delta would not allow any campaign in opposition to the agency shop when the union members voted on whether to continue the agency shop. In support of their argument, plaintiffs quote the deposition testimony of Captain Robert D. Shelton, who was the chairman of ALPA's Master Executive Council at Delta at the time the Supplemental Agreement was negotiated.[3] The deposition clearly shows, however, that the oral agreement in question was that *Delta itself* would not engage in or sponsor a campaign in opposition to the agency shop prior to the election. On the next page of the deposition transcript, Shelton explains that the oral agreement was that Delta would not "aid and abet" the anti-agency shop, anti-ALPA campaign. Shelton Dep. at 56. According to the declaration of H.C. Alger, Delta's Senior Vice President for Operations, the agreement was that Delta

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[3] A: As part of the condition of vote, it was agreed that the corporation would not conduct nor allow to be conducted on the property an anti-campaign against us for the vote. In other words, we [ALPA] would take care of that ourselves.

* * * *

The corporation would not mount a campaign against that provision nor allow that to occur within the methods they have of controlling that.

Shelton Dep. at 54-55.

would remain neutral.[4] *See* Alger Decl., Ex. A to Delta's Response to Pls.' Mot. Sum. J. (Filed Aug. 20, 1992). Plaintiffs have presented no evidence showing that there is any issue here for trial. They have not contradicted the declaration of H.C. Alger; they have no other statement by Shelton other than an unclear statement from his deposition which he himself explains on the next page. Even granting plaintiffs every inference, the Court concludes that no reasonable finder of fact could conclude from this record that the alleged "secret agreement" existed. The Court grants defendants summary judgment on this cause of action.

2. Fourth Cause of Action (Impermissible Collection of Moneys for Non-Germane Expenses):

Plaintiffs next allege that the Supplemental Agreement is unlawful on its face because it does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for nongermane union activities. ALPA acknowledges that *Hudson* and its predecessors prohibit the union from charging objectors for nongermane activities, but argues that this rule need not be incorporated into the agency shop agreement itself. The rights that plaintiffs are claiming are protected by ALPA's "Policies and Procedures Applicable to Agency Fees."[5] Arb. Ex. 10. Plaintiffs have raised no factual disputes with respect to this cause of action; the dispute

[4] Alger states, "With respect to such vote, I agreed with Captain Shelton that Delta would remain neutral—*i.e.*, Delta would not advocate either the retention or the rejection of the contract maintenance fee provision. I did not agree that Delta would not allow a campaign against retention of the contract maintenance fee provision to occur on Delta property." Alger Decl. at ¶ 2.

[5] The "Policies and Procedures" state, in part:

> 1. Nonmembers who are required to contract to pay an agency fee to ALPA as a condition of their employment may object to the use of their fees for purposes that are not germane to collective bargaining.

Arb. Ex. 10.

is simply whether the rights they assert and that established case law guarantees must be written on the face of the collective bargaining agreement. Because neither the RLA nor any court decision requires that such rights be incorporated into the language of the agreement rather than in a statement of policies and procedures, the Court grants the motion of ALPA for summary judgment on this issue.

3. Sixth Cause of Action (Illegal Grievance Procedure):

In plaintiffs' next cause of action, they allege that the grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for nongermane purposes. ALPA argues, and plaintiffs do not dispute, that these mechanisms are set forth in ALPA's "Policies and Procedures Applicable to Agency Fees." Arb. Ex. 10. ALPA does not dispute that *Hudson* and its predecessors mandate a procedure by which objectors may challenge the agency fee. Plaintiffs ask this Court to be the first court ever to hold that agency shop procedure must be part of the agency shop agreement. *See* Pls.' Oppn. to ALPA's Mot. Summ. J. at 23. The Court finds no authority to do so, and accordingly grants the motion of ALPA for summary judgment on this issue.

4. Seventh Cause of Action (Non-Germane Expenditures):

Plaintiffs claim that ALPA's 1992 SGNE was not audited as required by *Hudson*. Plaintiffs complain that ALPA does not audit the "germane/non-germane calculation" and that ALPA does not "examine annually its expenditures in each project code." Amendment to Compl. at ¶¶ 86A-86L. These allegations must fail because the 1992 SGNE was, in fact, audited by Price Waterhouse. The "Report of Independent Auditors," which is attached to the 1992 SGNE begins: "We have audited the accom-

panying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992." *See* 1992 SGNE. Plaintiffs are dissatisfied with the scope of the review, but the audit apparently satisfies the *Hudson* requirement. Nothing in *Hudson* requires the type of audit that plaintiffs seek; in fact, the only guidance on this issue given by the Supreme Court in *Hudson* is that:

> We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.' . . . The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosures surely would include the major categories of expenses, as well as verification by an independent auditor.

Hudson, 475 U.S. at 307, n.18. In *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991), the Fourth Circuit addressed this issue, concluding: "We have found no circuit decision which supports the contention that an independent auditor is required to make the legal determination as to that which is chargeable [to nonunion employees] and that which is not in order to satisfy the requirements of *Hudson*." *Id.* at 755. The only purpose of the audit requirement is "to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews v. Education Assn.*, 829 F.2d 335, 340 (2d Cir. 1987). As plaintiffs apparently concede, the Price Waterhouse review accomplishes this purpose by providing the assurance that the sums allocated to project codes are actually expended in support of those project codes. The Court grants the motion of ALPA for summary judgment on this count.

5. Seventh Cause of Action (Non-Germane Expenditures):

Finally, plaintiffs challenge that ALPA has not properly calculated its germane and nongermane expenses. Plaintiffs do not dispute the following characterization of their arguments in this cause of action:

1. That ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof;
2. That ALPA is required to, but did not, determine germane costs on an airline-by-airline basis;
3. That ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF");
4. That ALPA has not properly allocated "indirect" or "overhead" costs;
5. That ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining.

See ALPA's Mem. in Supp. Mot. Summ. J. at 21; Pls.' Oppn. to ALPA's Mot. Summ. J. at 29. The burden of proof for this count is on ALPA to prove that its calculation of germane/nongermane expenses is proper. "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40, n.40 (1977), quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).

ALPA's written "Policies and Procedures Applicable to Agency Fees" provide that, at the end of every year,

ALPA must determine which expenditures are germane and which expeditures are not germane to collective bargaining, and report those expenditures in a "Statement of Germane and Nongermane Expenses" ("SGNE"). ALPA creates the SGNE by dividing its project codes into germane and nongermane categories, and then calculating the amount spent on each code. ALPA's 1992 SGNE [6] includes six pages of notes to explain the expenditures and a 22-page "breakdown of germane and nongermane expenses by project." Arb. Ex. 11. Plaintiffs dispute the exact date that ALPA issued the 1992 SGNE, but it appears that ALPA issued the SGNE at least a year after plaintiffs filed this lawsuit.

A number of pilots challenged the 1992 SGNE and requested arbitration under ALPA's policies and procedures. Included among the challengers were the four original nonunion plaintiffs in this case. On January 21, 1994, plaintiffs filed a motion in this Court for preliminary injunction, seeking to enjoin the arbitration proceedings,

[6] The 1992 SGNE figures are:

Germane expenses:		
Negotiations	$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	55,559,797	81.00%
Nongermane expenses:		
Litigation	$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	13,035,531	19.00%
Total expenses	$68,595,328	100.00%

which were scheduled to begin on January 24. The Court denied the motion. An arbitrator from the American Arbitration Association ("AAA") held three days of hearings in January, February, and March 1994, and issued his Opinion and Award on August 10, 1994. After some confusion about which challengers were proper parties to the arbitration,[7] the arbitrator determined that 158 nonunion pilots were proper challengers. According to the arbitrator's opinion, 174 pilots initially requested arbitration of the agency fee. Thereafter, a number of challengers indicated that they wished to withdraw from the arbitration in order to join in the present litigation in federal court. By comparing the list of challengers in the arbitration award to the list of pilots who were permitted to intervene in this lawsuit by Order of December 8, 1994, the Court finds that, out of the 154 nonunion pilots in this case, 62 pilots were not parties to the arbitration and 92 pilots were parties to the arbitration. Plaintiffs' counsel attended the arbitration and, along with ALPA's counsel, was given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments.

Taking the expenses as claimed and audited, the arbitrator reviewed the allocation between germane and nongermane expenses in the 1992 SGNE. *See* Arb. Award at 18. The arbitrator determined that certain expenses that had been charged as germane actually were not germane. The arbitration award directed ALPA to recompute the agency fee charged to nonunion members by subtracting payments to International Federation of Air Line Pilots ("IFALPA") and International Transport Workers ("ITW"), expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs.

[7] *See* Arb. Award at 1-6 ("The situation regarding the preference for court litigation, as contrasted to arbitration under the AAA rules, is somewhat confusing even for pilots who have more than average intelligence." *Id.* at 5).

Aside from those categories, the arbitrator found that ALPA's computation of germane and nongermane expenses in its 1992 SGNE were supported by the evidence and applicable Court decisions, such as *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295 (4th Cir. 1993) (en banc); and *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991).

Specifically, the arbitrator rejected the challengers' claim that an expenditure may not be allowed as a germane expense without a detailed explanation of *every* claimed expenditure. The arbitrator found that ALPA had provided ample detail to justify its expenditures though project listing and explanation of the nature of the expenditures. Moving on to the merits, the arbitrator found that all expenses related to the Major Contingency Fund ("MCF") for 1992 were germane and properly charged to non-member agency fee payers. Next, he found that ALPA's costs relating to air safety activities were germane expenses, especially in light of the Supreme Court's decision in *Lehnert*. The arbitrator found that rent charges, including utilities, were allocated by project which were then separated into germane and nongermane expenses, so those charges were appropriately classified. The arbitrator found that expenses such as salaries, other expenses of officers and employees, and costs of facilities and equipment were germane. Finally, the arbitrator rejected the argument of the Delta pilots that they should be charged only for those expenses that were related to the negotiation of the Delta contract and the cost of servicing that contract.

At issue in the present case is to what extent, if any, the Court may defer to the factual findings of the arbitrator. Although the Supreme Court has held that the union is required to provide arbitration procedures in

RLA agency shop disputes, it is not clear what effect an arbitration award would have on subsequent or concurrent litigation. In establishing a procedure for these types of cases to be resolved through arbitration, the *Hudson* court noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [legal] action." *Hudson*, 475 U.S. at 308, n.21. It is thus clear that the arbitration does not have preclusive effect, but the Supreme Court has not directed the district courts in how much they may defer to the arbitrator's findings.

The parties and the Court were able to find only one case clearly on point, *Bromley v. Michigan Education Association-NEA*, 843 F. Supp. 1147 (E.D. Mich. 1994), *appeal pending*, Nos. 94-1164, 94-1210 (6th Cir.). In *Bromley*, as in the present case, a *Hudson*-type arbitration was held and an Arbitration Opinion and Award issued before the issues at the federal district court became ripe for disposition. The *Bromley* plaintiffs argued that the determinations of the arbitrator could be "virtually ignored," while the defendants maintained that the trial court could and should defer to the factual findings of the arbitrator. After considering the arguments of the parties, the court held, "[u]nless the arbitration award is to have a significant impact in subsequent judicial proceedings, the procedure spawned by the Supreme Court is largely a waste of time and money. . . . [I]t is the opinion of the Court that it is desirable and consistent with developing case law to give as much deference to the arbitration award as is consistent with the mandate of § 1983."[8] *Bromley*, 843 F. Supp. at 1153-54.

The Seventh Circuit discussed the arbitration process in *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir. 1991):

> Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair

[8] The plaintiffs in *Bromley*, like *Hudson*, were public school teachers, so the case was brought under 42 U.S.C. § 1983 (1988).

> share fee would place an overwhelming and unrealistic burden on the courts. . . . Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

Id. at 1314.

In light of the sparsity of case law and in light of the Court's decision to grant summary judgment for defendants on all other issues in this case, the Court requests further briefing from plaintiffs and ALPA with respect to the effect of *Hudson*-type arbitration on federal court litigation brought pursuant to the Railway Labor Act. In particular, the briefs shall address the following issues: (1) under the RLA, what deference should the Court give to the decision of the arbitrator where 62 out of the 154 nonunion plaintiffs were not parties to the arbitration; (2) what benefit, if any, did the nonunion members who were not parties to the agency fee arbitration receive from the award of the arbitrator; (3) assuming that the role of the Court is to review the decision of the arbitrator rather than holding a trial *de novo,* what standard of review should the Court use; (4) under the RLA, what power, if any, does a union have to require nonmembers to exhaust arbitration remedies in an agency fee dispute before bringing the claim in federal court; and (5) any other issues that plaintiffs or ALPA believe may have an impact on this decision.

CONCLUSION

The Court concludes that there is no genuine issue as to any material fact and that ALPA is entitled to judgment as a matter of law with respect to all claims except for the claim in plaintiffs' seventh cause of action that ALPA did not properly calculate its germane and nongermane expenses in its 1992 SGNE. Except for that issue, which the Court reserves to determine upon further briefing, plaintiffs have presented no facts that might affect the outcome of the suit under the governing law. Furthermore, as the only allegations against Delta were those that involved its connections to ALPA or its involvement in the alleged "secret agreement," the Court requests briefing as to whether any cause of action remains against Delta. On its own motion, the Court will also dismiss plaintiff Bruce R. Booher, the only plaintiff who is a member of the union. As the remaining issue concerns only nonunion members, plaintiff Booher has no cause of action and thus cannot possibly win relief. *See Best v. Kelly,* 39 F.3d 328, 331 (D.C. Cir. 1994). An appropriate Order will issue.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

Dated: April 28, 1995

[Filed Apr. 28, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants.

ORDER

Upon consideration of the motion of defendant, Air Line Pilots Association, International ("ALPA"), for summary judgment, the supporting and opposing memoranda, the entire record herein, including the record of the arbitration and the arbitrator's Opinion and Award, and for the reasons outlined in the Memorandum Opinion issued on this date, it is this 28th day of April, 1995.

ORDERED that the motion of ALPA for summary judgment be, and hereby is, granted as to issues 1, 2, 3, and 4 as listed on page 3 of the Memorandum Opinion issued on this date; it is further

ORDERED that the parties submit further briefing on issue number 5:

> Seventh Cause of Action (Non-Germane Expenditures):
>
> Plaintiffs allege that portions of fees paid by non-member pilots in 1992 under the Supplemental Agreement were used for purposes not germane to collective bargaining. Complaint at XI;

according to the following schedule: memorandum by defendant ALPA shall be due within fourteen days; memorandum by plaintiffs shall be due fourteen days thereafter; there shall be no replies. It is further

ORDERED that Bruce R. Booher be, and hereby is, dismissed *sua sponte* as a plaintiff in this action pursuant to Fed. R. Civ. P. 12(b)(6).

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

[Filed Aug. 2, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161

ROBERT A. MILLER, *et al.*,
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
DELTA AIR LINES, INC.,
Defendants.

MEMORANDUM OPINION

Plaintiffs in the above-captioned case are union and nonunion pilots employed by defendant Delta Air Lines ("Delta") and represented by defendant Air Line Pilots Association ("ALPA"), the exclusive collective bargaining representative for all pilots employed by Delta. In this action, plaintiffs challenge an "agency shop" agreement entered into by Delta and ALPA on November 1, 1991. This agreement became effective on January 1, 1992. Currently pending before the Court are the parties' cross-motions for summary judgment. Also pending before the Court is plaintiffs' motion to amend the complaint. Upon consideration of the parties' motions, the supporting memoranda, the entire record herein, and for the reasons outlined below, the Court will grant in part and deny in part the cross-motions for summary judgment.

BACKGROUND

Labor-management relationships in the airline industry are controlled by the Railway Labor Act ("RLA"), 45

U.S.C. §§ 151-188 (1988). In 1951, Congress amended the RLA to permit employers and unions to execute "agency shop agreements," which would require union-represented employees who chose not to be union members to contribute financial support to the union for its collective bargaining activities on their behalf. *See* 45 U.S.C. § 152, Eleventh.

ALPA has represented Delta pilots for several decades. In 1972, ALPA and Delta entered into an agency shop agreement, which was subsequently rescinded, in 1973, through a "secret ballot" of Delta union pilots. Delta did not enter into another agency shop agreement until November 1, 1991; at that time, Delta and ALPA negotiated the "contract maintenance" agreement (hereinafter "Supplemental Agreement") that is at issue in this case.

In December 1991, plaintiffs filed this lawsuit, seeking declaratory and injunctive relief to prevent implementation of the Supplemental Agreement. The seven counts of the complaint challenge the legality of the Supplemental Agreement on the following grounds:

(1) A provision in ALPA's policy manual prohibits ALPA from entering into an agency shop agreement without a secret ballot vote of the ALPA members at the airline involved;

(2) ALPA must permit nonmembers, as well as members, to participate in any vote concerning an agency shop agreement;

(3) A provision of the Delta agency shop agreement which calls for a vote of ALPA members prior to renewal of the agreeemnt is unlawful because it does not provide for the participation of nonmembers in such a vote;

(4) The Supplemental Agreement unlawfully requires payment of dues owed prior to its effective date;

(5) The Supplemental Agreement does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for union activities that are not germane to collective bargaining;

(6) The grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for purposes not germane to collective bargaining; and

(7) Portions of fees paid by nonmember pilots under the Supplemental Agreement will be used for purposes not germane to collective bargaining.

Because the effective date of the agreement was January 1, 1992, plaintiffs' complaint was accompanied by a motion for preliminary injunction. By Order dated December 31, 1991, the Court denied plaintiffs' motion for preliminary injunction, finding that plaintiffs had failed to establish a substantial likelihood of success on the merits of their claims.

On October 8, 1992, after defendants had filed their answers and the parties had fully briefed their cross-motions for summary judgment, plaintiffs filed a motion for leave to amend the complaint. The proposed amended complaint adds two new claims: (1) that there existed an illegal "secret agreement" between ALPA and Delta, and (2) that plaintiffs are entitled to an "independent audit" of ALPA's annual allocation of its expenditures as germane or nongermane to collective bargaining, and that ALPA failed to conduct such an audit. Defendants have opposed plaintiffs' motion to amend.

DISCUSSION

A. *The Parties' Cross-Motions for Summary Judgment*

The Court will consider in turn each of the claims advanced by plaintiffs in support of their contention that the Supplemental Agreement is unlawful.

1. *The Requirements of the ALPA Policy Manual*

Plaintiffs argue that Parts 3A and 3B of the ALPA Administrative Manual require ALPA to conduct a vote of Delta union pilots prior to entering into an agency shop agreement. The provisions upon which plaintiffs rely state as follows:

> Part 3A—*Agency Shop and Dues Checkoff*
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> ALPA shall, with concurrence of the respective pilot group, negotiate a "dues checkoff" procedure into each agreement. In addition, on those airlines where a demonstrated need exists, ALPA shall negotiate security clauses which may embody Dues Checkoff, Agency Shop or any other type of plan that is necessary to provide more member support for ALPA activities undertaken in their behalf as pilot employees.
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> Part 3B—*Agency Shop*
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> When the number of non-members on an airline represented by ALPA exceeds two percent of the pilots reflected on the Company's system Seniority List and after such time as a simple majority of the ballots returned by the membership of that airline has approved the provisions of an Agency Shop, ALPA shall negotiate an Agency Shop provision with such airline.

Plaintiffs interpret the first sentence of Part 3A, "concurrence of the respective pilot group," to require a vote among union pilots at the airline, whenever a "dues checkoff" procedure is negotiated. Furthermore, plaintiffs read this voting requirement into the second sentence of Part 3A; they claim that "the second sentence of 3.A [is] a continuation of the first sentence, so that the provision in the first sentence of acting 'with concurrence of the respective pilot group' is carried into the second sentence." Plaintiffs' Memorandum in Opposition to Defendants'

Motion for Summary Judgment (hereinafter "Pl. Opp.") at 19. However, the language of Part 3A does not compel this result. The plain language of Part 3A states only that "concurrence of the respective pilot group" is required prior to negotiation of "dues checkoff" procedures, not other plans negotiated by ALPA.

ALPA points out that it has consisently interpreted Part 3A to allow ALPA to negotiate an agency shop or other form of union security, without any requirement of a membership ballot. Such an interpretation is entirely reasonable, given the language of Part 3A. Furthermore, ALPA states that Part 3B requires ALPA to negotiate an agency shop when two conditions exist: (1) the number of non-members exceeds two percent of the pilots, and (2) a majority of the member pilots have voted in favor of an agency shop. Under ALPA's interpretation of the interaction of Parts 3A and 3B, then, Part 3B addresses situations where ALPA is *required to* negotiate an agency shop, while Part 3A addresses situations where ALPA *may* negotiate an agency shop. Plaintiffs, on the other hand, would read Part 3B to supersede Part 3A because it was adopted two years later. Under plaintiffs' interpretation, Part 3B establishes two conditions precedent to the negotiation of *any* agency shop agreement.

A reviewing court should give "considerable deference" to the interpretation of a union's constitution, rules, or regulations by officials of that union. *Monzillo v. Biller*, 735 F.2d 1456, 1458 (D.C. Cir. 1984). Such an interpretation should not be overruled "unless the court finds that the interpretation was unreasonable or made in bad faith." *Id.* In this case, the Court finds defendants' interpretation of the ALPA Administrative Manual provisions entirely reasonable. Moreover, plaintiffs have not offered any evidence of bad faith. Thus, the Court concludes that Parts 3A and 3B of the ALPA manual do not require ALPA to conduct a secret ballot vote prior to entering into an agency shop agreement.

2. *ALPA's Failure to Conduct Ballot of Members and Nonmembers on Agency Shop Agreement*

Plaintiffs argue that ALPA was required to ballot both union members *and* nonmembers prior to ratification of the agency shop agreement. In support of this contention, plaintiffs rely exclusively on *American Postal Workers Union, AFL-CIO, Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 665 F.2d 1096 (D.C. Cir. 1981) (hereinafter "Local 6885"), and the decision in that case on remand, *Local 6885*, 113 L.R.R.M. (BNA) 2433, 1982 WL 2198 (D.D.C. 1982).

Plaintiffs claim that, under the D.C. Circuit's holding in *Local 6885*, ALPA's failure to ballot union members on the agency shop agreement violated section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(1) (1988). In *Local 6885*, a parent union had negotiated a collective bargaining agreement for one of its local unions without complying with an explicit requirement of its own constitution calling for membership ratification of all collective bargaining agreements. The D.C. Circuit did hold that the union's failure to afford members of the local the same right to vote on the collective bargaining agreement as it afforded other union members was a violation of the "equal rights" provision of the LMRDA, 29 U.S.C. § 411(a)(1). However, that holding was based upon the provision in the union's national constitution which gave *all* union members the right to ratify collective bargaining provisions. As the D.C. Circuit pointed out, section 411(a)(1) "itself accords no voting rights to a union membership, but it does mandate that rights given to some members be available to all." *Local 6885*, 665 F.2d at 1101. The union had interpreted its national constitution to grant ratification rights only to national units; *Local 6885* simply held that such rights must be granted to all union members.

Unlike *Local 6885*, plaintiffs in this case can point to no provision in ALPA's constitution, rules, or regulations

which would require ALPA to conduct a ballot of either its members or nonmembers prior to ratification of any agency shop agreement; the "equal rights mandate" of § 411(a)(1) is therefore not implicated here.

Plaintiffs' reliance on the remand decision in *Local 6885* is similarly misplaced. The issue on remand which is dealt with in the district court's opinion concerns the question of whether nonmembers of the local union, who were intervenors in the case, were entitled to share in the damages to be awarded against the parent union. The district court held that they were entitled to damages:

> Since the union admittedly breached its duty to the local with respect to the ratification phase [of the collective bargaining agreement], it was certainly foreseeable that the damages flowing from that breach would affect the non-member employees as well. If the union's failure to submit the contract for ratification showed a disregard of the interests of the local, it certainly also showed a similar disregard for the interests of the intervenors.

Local 6885, 1982 WL 2198 at *2. The court's determination that the union had breached its duty of fair representation to nonmembers thus clearly depended upon the D.C. Circuit's determination that the union had also breached that duty for local union members. However, no such situation exists here. ALPA has not breached any contractual duty to its member pilots; thus, even if nonmembers were entitled to some of the same rights that union members enjoy, no rights of union members have been violated in this case.

3. *Participation of Nonmembers in Union Vote on Renewal of Agency Shop Agreement*

Plaintiffs claim that the agency shop agreement is invalid on its face because section A.9 of the agreement does not expressly allow nonmembers as well as members

to vote on renewal of the agreement. Section A.9 provides as follows:

> It is understood and agreed that 90 days prior to the amendable date of this Agreement the Association shall cause a vote to be taken of all members in good standing at that time to determine if they desire that this membership provision continue in full force and effect for the balance of this agreement and thereafter.

Plaintiffs again rely upon the district court remand decision in *Local 6885* for the contention that nonmembers are entitled to the same rights as members and that therefore this provision violates ALPA's duty of fair representation to nonmembers. However, as the Court has already pointed out above, *Local 6885* does not establish so broad a proposition. In fact, the district court expressly found that nonunion employees "are, of course, not entitled to the rights of union members." *Local 6885*, 1982 WL 2198 at *1. Thus, the Court will reject this claim.

4. *Payment of Dues Owed Prior to the Effective Date of the Agency Shop Agreement*

Section 27.A.1 of the Delta agency shop agreement states that a nonmember pilot is obligated to pay a service charge to ALPA "sixty (60) days after the effective date of this Agreement or the completion of his probationary period, whichever is later . . . ." The effective date of the agreement is November 1, 1991; therefore, nonmember pilots are obligated to begin paying agency fees on January 1, 1992, at the earliest. Plaintiffs argue that section 27.A.3 of the agreement makes it possible for ALPA to compel payment of union dues and assessments incurred prior to the effective date. Section 27.A.3 provides:

> If a pilot covered by this Agreement is, at the time of implementation of this agreement delinquent, or becomes delinquent in the payment of fees, dues and

> assessments . . . the Association shall notify him . . . that he is delinquent and is subject to discharge as a pilot of the Company. Such letter shall also notify the pilot that he must remit the required payment within a period of fifteen (15) days or be discharged.

Plaintiffs argue that, because the phrase "the time of implementation of this agreement" means January 1, 1992, this section allows ALPA to penalize nonmembers for delinquencies incurred prior to that date. However, ALPA points out that the payment obligation defined in section 27.A.1 only begins on January 1, 1992; thus, there can be no delinquency incurred prior to that date. ALPA claims that the phrase refers to that time when pilots first become susceptible to discharge under the agreement.

More importantly, ALPA agrees that it cannot lawfully seek the discharge of any pilot for failure to pay any financial obligation which accrued prior to January 1, 1992. Furthermore, it has assured the Court that it will not do so. Plaintiffs have thus received the relief they seek under this claim.

The remaining claims will be denied without prejudice to renewal following further proceedings, including the additional round of discovery.

SO ORDERED.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

Dated: July 30, 1993

AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 16-673-00277-93DS

In the Matter of the Arbitration

between

AIR LINE PILOTS ASSOCIATION (ALPA),
Union

and

AGENCY FEE CHALLENGERS
Challengers

(Agency Fee Arbitration)

AMENDED
OPINION & AWARD

The instant agency fee arbitration was the subject of hearings held on January 24, February 24, and March 28, 1994, before the undersigned duly appointed Arbitrator. All parties were given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments. A hearing had been scheduled for April 26, 1994 and, pursuant to the agreement of counsel for the Union and Challengers that further evidence was not needed and that the record was complete, except for certain matters received by stipulation, the hearing scheduled for April 26 was canceled.

Challengers were advised of an opportunity to request the transcript of the hearings. None of the Challengers requested the record.

Briefs, reply briefs, and second reply briefs were received from counsel for the Union and counsel for some Challengers, and have been fully considered. Comments from some individual Challengers received before, during, and after the hearing have been considered.

Based on the evidence and the submissions of all parties to this proceeding the undersigned makes the following findings and Award.

I. *Introduction*

The original request for arbitration of challenges to the Union's determination of the fair share fee, also called agency fee, payable by non-members, involved 174 Challengers, based on information provided by the Union to the American Arbitration Association.

Thereafter, a number of the Challengers indicated that they wished to withdraw from the instant arbitration and to, instead, join in litigation in the Federal District Court relating to this matter that had been filed by Mr. Hudock on behalf of four named agency fee payers and one Union member. There was substantial correspondence among Challengers expressing a preference for a court determination, counsel for the Union and the Challengers, and the undersigned Arbitrator.

A set of letters were received from Challengers indicating a preference for a court determination, but also wishing to protect their right to protest the Union's determination of the agency fee through arbitration.

The Challengers' counsel sought to enjoin the instant arbitration. The District Court for DC denied the request to enjoin the instant arbitration. As a result of the court's ruling, Mr. Hudock participated in the arbitration procedures on behalf of a number of Challengers. Among the issues to be resolved is a determination of who are the Challengers covered by the instant arbitration.

We shall address each of the issues raised in this proceeding at the hearing, by briefs or by comments from Challengers, topic-by-topic.

II. *Challengers*

The Union's procedure, relating to the filing of a challenge to the agency fee charged to non-members, provides, in relevant part, for the Union to advise agency fee payers of the Statement of Germane and Non-Germane Expenses (SGNE) for the prior year as a basis for determining the fee payers payments. The evidence reveals that the SGNE statement for 1992 was prepared in June 1993 and dated June 14, 1993. The record is not clear as to when it was mailed to the agency fee payers.

The record does establish that, pursuant to the Union's policy of having the American Arbitration Association process such challenges to the agency fee, it submitted a list of such Challengers by letter of September 29, 1993 and requested that the American Arbitration Association (AAA) appoint an arbitrator and process the challenges under its Rules for Impartial Determination of Union Fees. That list, as later corrected, contained 174 names and addresses.

Among the Challengers listed were four non-member agency fee payers and one Union member who had filed a suit in the District Court for the District of Columbia seeking to have the matter heard in court and who also sought to enjoin the instant arbitration.

A number of Challengers advised the AAA that they preferred a court determination and some stated that they would only participate in the arbitration if it followed court procedure and court precedent.

The undersigned advised all listed Challengers, through the AAA, by letter of November 22, 1993, that the procedures to be followed were those set forth by the AAA; that the burden of proof was on the Union; that the arbi-

tration would proceed so long as there was at least one Challenger; the arbitration would proceed unless and until enjoined; and court decisions and other relevant case law would be applied in determining the appropriate agency fee.

Thereafter, the AAA received withdrawals from the arbitration and requests to revoke earlier withdrawals and designations of Mr. Hudock as the counsel representing some Challengers.

In their briefs, the Union argues that the number of challenges is now 90, and enclosed a list of those Challengers. It contends that the agency fee payer had to submit a written objection during 1992; only non-members could file a challenge to the SGNE; the request for arbitration had to be within 30 days after receipt of the SGNE; and any Challenger, who had withdrawn from the arbitration, was thereafter excluded. It notes requests after September 29, 1993 were untimely.

Counsel for a group of Challengers, claiming to represent 159* non-member pilots, argues that the Union seeks to exclude all Challengers; that the requirement to file objections during 1992 was unrealistic because of confusion in the 1992 report relating to 1990 and 1991. It argues that the Union did not submit its SGNE timely within 30 days and cannot now seek to enforce its own rules which it violated.

The undersigned arbitrator has found that, of the original 174 Challengers listed by the Union in its letter to the AAA, 35 pilots apparently withdrew from this arbitration. Some 25 of those individuals have requested representation by Mr. Hudock and have so advised the AAA and/or are listed by Mr. Hudock as pilots whom he represents.

The Union and Mr. Hudock executed a stipulation, dated April 27, 1994, providing that the AAA should

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Supplemented by four more clients by letter of June 27, 1994.

send letters to 75 listed pilots advising them of their right to obtain copies of the transcripts and exhibits and of their right to file comments with the AAA by May, 27 1994.

The original number of Challengers listed in the Union's submission of this matter to the AAA was 174. Absent evidence that any pilot seeking to be added to that list of 174 had been denied the opportunity to file a challenge to the SGNE prior to September 29, 1993, we find no reason to add to that list of Challengers, which reflected the maximum number of pilots who had met the conditions to file a challenge to the SGNE. Since we have not been furnished any evidence as to why any non-member agency fee payer should be added to that list, we shall not expand the list beyond that number.

We next come to the question of withdrawals from the status as Challenger by any pilot listed in the original list of Challengers. The situation regarding the preference for court litigation, as contrasted to arbitration under the AAA rules, is somewhat confusing even for pilots who have more than average intelligence. Bearing in mind that this is the first arbitration of agency fees, despite earlier challenges by non-members of the Union, we believe the purpose for permitting a challenge to the agency fee, payable by non-members, will be served by permitting those who did withdraw from the arbitration to be included when they later either advised the AAA that they rescinded their withdrawal or elected to be represented by Mr. Hudock in the arbitration. We shall not, however, permit additional non-members to become parties, absent evidence that they did not receive the SGNE or did not know of the contents of the SGNE and of their right to challenge that report. The list of Challengers included in the instant proceeding, based on our decision regarding the status of those that withdrew, directly rescinded their withdrawal or rescinded it by requesting representation by counsel, or did nothing after initially filing a challenge, is attached as Appendix A.

II. *Dues Calculations*

The Union's dues structure consists of assessing all members a charge of 2.35% of the members' earnings as reflected on the members' W-2 issued by the airline. That dues rate has existed since 1985.

Some Challengers have raised questions regarding the collection of dues based on income earned in a preceding year and reported in the 1992 calendar year. They have raised questions regarding dues charged against vacation pay.

The undersigned has no role to determine the amount of dues and, therefore, no right to inquire into how dues are collected, what the amount is or what the Union uses as the base for its calculation. Whether the Union's dues are $100 per year or $2,500 per year is not within the purview of this proceeding. This agency fee determination is confined to the issue of whether the expenses charged to non-member agency fee payers are germane to the Union's representation functions, i.e., negotiations and implementation of the agreement and those expenses involved in the Union's fulfilling its duties as the exclusive representative of employees. (See *Ellis v. Brotherhood of Railway and Steamship Clerks*, 466 U.S. 435 (1984).

IV. *Union Structure*

The record indicates that the Air Line Pilots Association (ALPA) operates as a national union with a single staff, single set of receipts and one set of expenditures covering all of its operations. It functions through a Board of Directors which has an Executive Board, then through an Executive Council and President. There is an Executive Administrator, various Vice Presidents, and a General Manager. There are eleven departments responsible for the following functions: Engineering and Safety, Representation, Legal, Accident Investigation, Communications, Government Affairs, Finance, Office Administration, Information, Retirement and Insurance and Human

Resources. There are also subcomponents in some departments.

The Union negotiates a separate collective bargaining agreement for each of 36 airlines. The collective bargaining agreements are negotiated by a Master Executive Council elected by the Union's members at the respective airlines. There are also local councils (LEC's) which may cover geographic areas, which exist within the Master Executive Council (MEC). Although the MEC's have some degree of autonomy in negotiating with their respective carriers, they are subject to policies established by the Union's governing bodies. The MEC's, which do the negotiating, are assisted by staff from the Union. The members doing the negotiating are reimbursed by the Union for lost pay when involved in performing such services.

Grievances, in large part, are presented by the staff from the Union's Representation Department who are generally attorneys.

The Challengers contend that, because there are no nationwide master agreements covering more than one airline and each collective bargaining agreement is separate, the costs of negotiating and servicing each airline collective bargaining agreement should be charged against that carrier's members and cites cases in support.

ALPA contends that it does coordinate bargaining strategy on a national basis; that national staff are involved in negotiations; and each negotiation does impact other negotiations.

In addition, the Union cites several cases to support the unified dues structure and charges as contrasted to separate carrier-by-carrier charges.

In the view of the undersigned, this issue was disposed of by the Court of Appeals for the Fourth Circuit in *Crawford v. Air Line Pilots Association*, 992 F2d. 1295

(1993) (Cert. Denied) 143 LRRM 2185, where the Fourth Circuit stated, in relevant part:

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> The principal complaint of the objecting nonunion pilots concerns ALPA's use of their agency fees to support strikes and other activities of bargaining units at airlines where they are not employed. Closely related is their complaint that ALPA used their agency fees to support the major contingency fund. The nonunion pilots assert that use of agency fees for expenses related to bargaining outside the unit at the airline where a pilot works violates both the Railway Labor Act and their constitutionally protected rights of free association.
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> Section 2. Eleventh of the Railway Labor Act provides that regulated carriers and unions may agree that "as a condition of continued employment, all employees shall become members of the labor organization representing their craft and class." 45 U.S.C. § 152, Eleventh (a). This provision was added to the RLA in 1951. Five years later, the Supreme Court sustained the agency-fee provisions of the RLA against attack on their facial constitutionality under the First and Fifth Amendments. *Railway Employees Department v. Hanson,* 351 U.S. 225, 238 [38 LRRM 2099] (1956). At the same time, it found that the requirement that unwilling workers pay agency fees to the union might under other circumstances pose a constitutional problem, since the enactment of § 2, Eleventh is "the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Hanson,* 351 U.S. at 232.
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> The intrusion into individual freedom of choice is justified by Congress' desire to ensure "[i]ndustrial peace along the arteries of commerce, *"Hanson"*, 351

> U.S. at 233, and by the need to reduce labor friction through "the elimination of the 'free riders'—those employees who obtained the benefits of the unions participation in the machinery of the Act without financially supporting the unions." *International Ass'n of Machinists v. Street,* 367 U.S. 7a40, 761-62 [48 LRRM 2345] (1961). However, the RLA does not give "unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Street,* 367 U.S. at 768-69 [footnote omitted].
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> *Lehnert v. Ferris Faculty Ass'n,* 111 S.Ct. 1950 [137 LRRM 2321] (1991), concerned not a carrier regulated by the RLA but a public-employee union exacting agency fees pursuant to a state statute. However, "[b]ecause the Court expressly has interpreted the RLA 'to avoid serious doubt of [the statute's] constitutionality,' the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert,* 111 S.Ct. at 1957 (citations omitted). Examining the prior cases, the Court deduced that the constitutionality of challenged agency-fee expenditures must be measured against a three-part test. Chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.
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> 111 S.Ct. at 1959.
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> Applying these principles, the Court specifically rejected the agency-fee objectors' contention that the "local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf

of the bargaining unit to which the objecting employees belong." The Court found this contention "to be foreclosed by our prior decisions." 111 S.Ct. at 1959. To require that expenses concern the specific bargaining unit "would be to ignore the unified-membership structure under which many unions, including those here, operate." 111 S.Ct. at 1961. Under this structure, "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S.Ct. at 1961.

The Court recognized limitations on the union's power to spend exacted fees for bargaining activities unrelated to the bargaining unit: the Constitution bars "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," as well as a "contribution by a local union to its parent" that is "in the nature of a charitable donation." 111 S.Ct. at 1961. Nevertheless, extra-union bargaining expenditures are legitimate if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." 111 S.Ct. at 1961-62. Among the expenditures approved by the *Lehnert* Court in this context were funds used to prepare for a potential strike. The Court upheld the district court's findings that such preparations are "reasonable bargaining tools." 111 S.Ct. at 1965.

[1] The holding in *Lehnert*, read in conjunction with the district court's extensive findings of fact, makes

the union's case for the challenged expenditures, if anything, stronger than it had been under previous precedent. ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargaining process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent the extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position in each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargaining pattern and practice in the airline industry.

Accordingly, we find that ALPA's use of a single system of expenses without reference to the members particular carrier and a single combined system of charges to agency fee payers without reference to their individual airline employer is proper.

V. *Accounting Methods*

The evidence reveals that the Union tracks its expenses by functions through a system of some 1,200 projects. The expenses are charged both to a natural cost category and to a project code, per the testimony and report of the auditing firm. Employee wages and benefit costs are allocated to specific projects based on time records. Rental records allocate cost to the project based on square footage used.

Pilots of various airlines are used by the Union to perform various Union functions, including negotiations, grievance processing, and safety investigations. These non-employees are compensated for their lost earnings and expenses under appropriate project expense items.

The projects are set on a functional basis and are allocated as germane or nongermane based on the nature of the project. The determination of whether a project is germane or nongermane is based on a review of the project function by the Union's Legal Department and its Director of Finance. The project system, as a method of determining germane and nongermane expenditures, has existed since 1986 and, as new projects are established, they are reviewed against guidelines established by the Union's Legal Department.

The 1992 SGNE audit states that an audit was conducted using generally accepted auditing standards, involving examination "on a test basis" of the evidence supporting the amounts claimed.

That audit statement, signed by a well recognized and reputable accounting firm, stated that the stated germane and nongermane expenses were provided based on the Union's methodology which was noted to be as follows:

NOTE 3—MANAGEMENT DEFINITIONS, SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE CATEGORIZATION OF EXPENSES AS GERMANE AND NONGERMANE

Germane Expenses

Under law, individuals who are not members of a union but who are nevertheless compelled to pay union dues or fees under an agency shop are entitled to object to sharing the cost of any union activities not germane to collective bargaining. Such individuals are entitled to a pro rata adjustment for any expenditures that are not germane. Union expenses are considered "germane to collective bargaining" if they are (1) germane to collective bargaining activity, (2) justified by the government's policy interest of promoting labor peace and avoiding "free riders," and (3) not an additional burden on freedom of speech. Included among these costs are expenses in-

curred in connection with the negotiation and administration of collective bargaining agreements, the filing and processing of grievances and arbitration of disputes arising from those agreements, leadership training, and the costs incurred in maintaining the Association as an administrative organization. The specific expenses included in this category are described as follows:

Negotiations

This designation included the costs of negotiating agreements with member airlines. Included are major mid-term negotiations, such as occurred at Delta and Northwest; normal mid-term negotiation such as occurred at United; and formal Section 6 contract negotiations. Virtually all represented airlines engaged in one or more of these types of negotiations during 1992. Section 6 negotiations were commenced, continued, or completed during 1992 with Allegheny Commuter Airlines, Air Midwest, Atlantic Southeast Airlines, Atlantic Coast Airlines, Business Express, ComAir, DHL Airways, Henson Airways, Mesaba, Reeve Aleutian Airlines, Ross Aviation Simmons Airlines, States West, Trans World Airways, Trans World Express, and U.S. Air. Negotiation costs include those incurred by the ALPA Negotiating Committee and other officials in the course of meeting, preparing for and conducting negotiations, communicating with pilot groups before and throughout negotiations, and conducting continuing meetings with management representatives to address new issues and resolve disputes as they arise. The expenses of the Associations' Local Councils, Master Executive Councils, and national governing bodies are also included here, since most of

their meetings are devoted to collective bargaining issues. The Associations' aviation safety-related expenses, closely related to its negotiations, are included as well in this category.

Grievances

Expenses associated with processing grievances and System Board and Retirement Board proceedings to resolve disputes arising under collective bargaining agreements are captured in this category.

Union Administration

Union Administration costs are those expenses associated with maintaining the Association's institutional structure as a labor union, and include the costs arising from the democratic process. Expenses include flight pay loss and expenses for the Associations' national officers (other than the President), voting and balloting costs, dues billing and collection, and maintenance of agency shop agreements.

General Administration

This category captures general overhead and administrative expenses associated with maintaining and staffing offices throughout the country. Insurance costs, the President's salary, and the costs of the Association's administrative department and accounting and reporting functions are included in this category.

Nongermane Expenses

Nongermane expenses include the costs of activities not directly related to collective bargaining. Included among these costs are expenses incurred in helping pilot groups to organize themselves, lobbying and political activities, and some public relations and litigation expenses. The specific expenses included in this category are described as follows:

Litigation

The Association interprets recent court cases to allows the treatment of most of its litigation as germane and chargeable, at a minimum, to the pilots employed by the airline or airlines affected by the litigation. However, administrative considerations make such an allocation impractical at this time. For purposes of this report, the Association has chosen to treat such litigation as nongermane.

Organizing

The expenses of the Association's assistance to employees interested in organizing themselves for collective bargaining purposes are treated as wholly nongermane.

Charitable

The Association's charitable activities include contributions to the United Way, administration and funding of a college scholarship program, and support for a reward program to apprehend terrorists.

Insurance

The Association administers several insurance programs for active and retired members and their families. That portion of the premiums that is retained by the Association as a fee for administering the programs has been offset against the total cost of providing the insurance, and the net cost is treated as nongermane.

Legislative

All expenses identified with legislative activity have been treated as nongermane.

Publications

Forty-five percent of the net cost of Air Line Pilot Magazine, after considering subscription and advertising revenue, is treated as nongermane to collective bargaining to reflect the ratio of germane to nongermane materials in the magazine and the Association's other publications. The remaining 55% of expenses is captured in the Negotiations category. The costs of Master Executive and Local Council newsletters are also allocated between Negotiations, a germane category, and Publications, a nongermane category, on the same basis. Media and public relations expenditures have been included in this category as well.

Affiliation fee

The Association's annual per capita payment to the AFL-CIO is treated as nongermane.

The Challenger's counsel contends that the Union has failed to disclose the nature of the projects so that a determination may be made as to germane and nongermane expenditures. The Challengers argue that there is a lack of information for 92% of the projects regarding natural accounting data. They further argue more specifically that various allocations lack sufficient information to delineate between germane and nongermane.

The Challenger's counsel introduced an exhibit, which is a financial report for two years ending December 31, 1992, which showed a difference in the total expenses from that introduced as the SGNE by the Union and asserts that the Union never explained the difference between the two documents. The Challenger's exhibit did not have a break out of germane and nongermane expenses. The Union's financial report, used to determine non-member agency fees, has some differences. The Challenger's exhibit is a consolidated financial statement and

includes expenses and income not found in the statement used to calculate the agency fee payments.

Another statement introduced by the Challenger's counsel constituted a break out of germane and nongermane expenses.

The Union's financial expert stated that the exhibit, offered by the Challengers, was a working statement rejected by the Union because it could not adequately be supported in its allocation of expenses.

The unacceptable worksheet finds that 81% of all expenses, including interest, were chargeable as germane and 19% were not germane. In fact, the "official" SGNE report, furnished to the agency fee payers and used as the working document for this proceeding, has the same percentage allocation of germane and nongermane expenses, with some variations between the totals in both financial reports with the unacceptable report containing somewhat higher dollar figures for each category.

In the absence of any specific requirement regarding the methodology to be used to determine germane and nongermane expenditures, we must conclude that an audited statement of such expenses meets the requirements established by court decisions.

That SGNE, attached as Appendix B, which was sent to the Challengers, does contain sufficient information to permit an intelligent appraisal of the nature of the expenses and the project for which they were expended.

We know of no requirement that the expenses be detailed for each project by categories of salaries, travel, rents, etc. The items are sufficiently identified so that at the hearing the arbitrator and the Challenger's counsel were able to make appropriate inquiry regarding the nature of the expense. In the report of germane and nongermane expenses rejected by the Union because it could not be supported by the records, there was less detail and

the categories were grouped together. We cannot conclude that less detail is preferable in determining how the monies were spent. For example, an item on Challenger's Exhibit F is marked as flight pay loss with a total in excess of $11 million of which 93-94% is carried as germane. By contrast, the largest dollar expenditure under any project in the SGNE is slightly more than $4 million for contract negotiations, which may include some payments for lost flight pay to members of the negotiating team.

The SGNE contains detailed project expenditures under broad categories of negotiations, grievances, general administration, union administration, litigation, legislation, publications, organizing, insurance, charity and per capita payments. It permits questions regarding safety items that are identified; it permits inquiry regarding expenditure on TWA-Icahn expenditures; and various categorized office expenses.

Based on all of the above, we find that the SGNE meets all the criteria as a report of expenses categorized as germane and nongermane. We shall proceed from that basis and utilize the SGNE to make specific determinations regarding chargeable germane expenses and the proper percentage of all expenses that could be assessed against nonmember agency fee payers.

VI. *Burden of Proof*

The case law establishes that the Union bears the burden of establishing the proportion of chargeable expenses which are assessed against non-member fair share fee payers. That obligation is satisfied by a reasonable explanation and evidence which warrants a conclusion that the expenses were relevant to the Union's performance of those representation functions for which non-members may be charged. The Union cannot be expected to detail every dollar that was spent for germane expenses. As noted by the Supreme Court in *Hudson*, they need provide "an adequate explanation" and it recognized that "absolute precision" could not be expected. The Challengers reliance on the arbitrator's statement that ALPA had the burden of proof of "establishing . . . that the expenses claimed as germane are germane" should not be construed as more than a general statement of the arbitrator's view of the court decisions controlling this case.

The role of ALPA is to provide sufficient information from which a reasonable person could conclude that the expenses claimed for 1992 as germane were spent for functions viewed by the courts and/or administrative bodies dealing with agency fee determinations, to be germane. We need not trace each penny or account for every minute of an employee or officer's time or seek absolute precision, which the Supreme Court recognized was not to be expected.

Our role is not to determine whether X dollars were spent for rent or Y dollars for utilities or Z dollars for the respective officers' salaries. That role is essentially the function of the audit. We have evidence that the figures for 1992 were audited by a recognized accounting firm using accepted accounting principles. We shall not go behind those figures. In accepting the performance of an audit on the 1992 calculations, we have considered the Challenger's counsel's contention regarding a 1991 statement that an audit could not be performed. We also note that, *in fact*, an audit was performed and was signed by a major accounting firm.

Our role is to determine whether the cost allocation claimed to be germane, i.e., spent for negotiation or implementation of an agreement or the performance of representational duties, as contrasted to lobbying or performance of functions not deemed germane, e.g., organizing, is supported by the evidence and, thus, chargeable as germane. If the claimed amount is not fully chargeable as germane, what, if any, part of that expense is chargeable as germane.

It must be noted that our role is not to determine the propriety of payment of legal expenses or any other expense of any Union officer, or any other expenditure, as raised by one Challenger. This proceeding is not intended to inquire into the Union's use of monies. This arbitrator's role is confined to a determination of whether claimed expenditures, as audited, were properly charged as germane expenses related to the performance of representational functions.

Because the Challengers, individually and collectively through counsel, raise questions about the propriety of many expenditures, it is necessary to make abundantly and exquisitely clear that the undersigned has no role to inquire into how the Union spent its treasury—the vast majority of which came from members who are not represented in this proceeding. Rather, our role is predicated on an allocation of the expenses as assessed against non-member agency fee payers. The question is not whether the expenditures were wise. The issue is not whether the expenditures were pursuant to proper authorization. The role of the arbitrator, in our view, does not include any determination of embezzlement of monies by an officer or employee.

We take the expenses as claimed and as audited. From that, we review the allocation between germane (chargeable to agency fee payers) and nongermane (not chargeable to the non-members). This determination is based on the use of the stated expenses, as set forth in the record before us.

Counsel for the Challengers argues that, absent a detailed explanation of every claimed expenditure, it may not be allowed as a germane expense. We disagree. The Union has provided ample detail to justify its expenditures, both by project listing and by explanation of the nature of the expenditures. We shall, on that basis, review the expenditures which may be questionable based on our own

identification of such projects or based on issues raised by Challengers.

VII. *Major Contingency Fund*

The Union has maintained a Major Contingency Fund (MCF) used for the purpose of having the ability to support a strike affecting one or more carriers which employ its members.

The fund is the result of charging all members and non-member agency fee payers one half percent of their wages as a contribution to that fund.

The Union's constitution provides for such a MCF and provides that payments to the MCF would be suspended when it reached $50 million.

The Challengers assert that the 1992 SGNE shows revenue of $195 million and expenditures of approximately $9 million, leaving a surplus of approximately $11 million unspent. It argues that the surplus is a loan to the Union and, thus, not properly chargeable as a germane expense to agency fee payers. It notes that no provision exists for a refund of monies over $50 million to other than members, resulting in a loss of non-member agency fee payers. The Challengers argued for a refund of that 1992 surplus to non-payers.

The Union's Constitution provides:

> "The Major Contingency Fund shall be maintained as Association Funds to be separately accounted for, with earnings and appreciation thereon to be a part of such Fund. The Major Contingency Fund shall not be utilized under any conditions as a source of funding for past or current budgeted operational expenses. Such Fund may be utilized only for the following purposes:
>
> (1) To treat with issues of urgent concern that significantly and adversely affect the airline piloting pro-

> fession and which cannot be funded by normal Association budgeting practices and policies."

From that provision, the Challengers argue that use of the MCF to fund general expenses, not related to strikes, is illegal. It cites the expenditure of approximately $2 million for debt interest on a real estate corporation and transferring $5 million to the general fund in 1992 and receiving a note for that money, in addition to $5 million transferred in 1991.

It points to transfers from the MCF to keep it below the $50 million mark and avoid suspending contributions.

It argues that expenditures for "TWA-Icahn privatization" and a similar expenditure regarding "TWA-Icahn exit" from the MCF did not involve a strike and were illegal.

The Challengers assert that the MCF has been used improperly and is not a chargeable item and that, by precluding the attainment of the $50 million total by illegal means, it is making an interest free loan to the Union—one precluded by Court decisions.

The Union argues that the MCF has been held to be proper and chargeable as a germane expense applicable to all pilots regardless of their employers because it is intended to protect the entire union. The Union contends it cannot be expected to start each year with a zero balance.

The fourth Circuit in *Crawford v. Air Line Pilots Association*, 992 F.2d., 1295, 143 LRRM 2185, in relevant part, held:

> The Court recognized limitations on the union's power to spend exacted fees for bargaining activities unrelated to the bargaining unit: the Constitution bars "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," as well as a "contribution by a local union to its parent" that is "in the nature of a charitable donation." 111 S.Ct. at 1961. Nevertheless, extra-unit bargaining expenditures are legitimate if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." 111 S.Ct. at 1961-62. Among the expenditures approved by the *Lehnert* Court in this context were funds used to prepare for a potential strike. The Court upheld the district court's findings that such preparations are "reasonable bargaining tools." 111 S.Ct. at 1965.

[1] The holding in *Lehnert*, read in conjunction with the district court's extensive findings of fact, makes the union's case for the challenged expenditures, if anything, stronger than it had been under previous precedent. ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargaining process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent the extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position in each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargaining pattern and practice in the airline industry.

II

[2] Appellants attempt to challenge the use of their fees for the major contingency fund as an "involuntary loan." While the *Lehnert* Court cautioned in

dictum that exacted funds could not be used for an "interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," 111 S.Ct. at 1961, the ALPA fund does not match that description. The fund is, in the findings of the district court, "a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit." Like the payments to the national union approved in *Lehnert*, the fund "contributes to the pool of resources potentially available to the local" and thus "is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S.Ct. at 1961. Here, the purposes for which the fund was created were, by finding of the district court, germane to collective bargaining. As they were designed to further the union's duty of representation, they were by definition justified by the policies underlying the RLA. Finally, we do not believe that the burden to constitutional rights imposed by permissible exaction of fees is heightened simply because the funds are assessed in advance of labor actions rather than contemporaneously or after wards.

> Accordingly, applying the test enunciated by the Court in *Lehnert*, we hold that a pro rata share of strike support benefits for pilots in other bargaining units and of the pro rata cost of the major contingency fund may be charged to objecting agency-fee payers. *Accord Pilots Against Illegal Dues v. Airline Pilots Ass'n*, 938 F.2d 1123, 1131 [137 LRRM 2963] (10th Cir. 1991).

We believe the Court decision in *Crawford*, addressing the same facts that are before us, is dispositive of the broad questions of the right of the Union to collect funds for the MCF as a chargeable expense without reference to

the particular agency fee payer's employment and that the funds need not be spent each year.

Going beyond *Crawford*, we view the expenditures relating to "TWA-Icahn Privatization "as addressing possible bankruptcy or employee purchases to be as related to collective bargaining as a strike fund and to fall within the general area of use permitted in the contingency fund. Additionally, these expenditures were for contingency matters which could affect other carriers and their pilots.

As regards the alleged illegal loan, we find that *Crawford* disposes of that issue and find no impropriety in the MCF based on that allegation. In addition, record testimony indicates that part of the payment to ALPA from the MCF was to repay the Union's expenditures regarding job actions.

We now consider the allegation that the Union has improperly used the MCF to prevent accumulating the $50 million, which would result in a suspension of collections for the MCF. We find that our charter does not extend to the Union's methods of operations as regards efficiency, whether it borrows money externally or internally. Our role does not address the size of salaries, the luxury of furnishings, whether officers travel first class or coach, the price paid for meals, hotels, cars, etc.

Those issues all belong within the internal relations of the Union and may be addresed by members in their elections, in conventions or in court, if they violate the contract between the member and the Union.

Thus, whether the MCF should put its money in a bank, or loan it to the Union, is not before the undersigned. Similarly, whether the MCF has engaged in creative finances to prevent reaching the $50 million maximum involves the relationship between the Union and its members who pay the dues. For example, nothing would preclude the Union from changing the amount to $100 million or

increasing the percentage of salary paid to the MCF. Clearly, these are issues far broader than the amount paid by the non-member agency fee payer. They affect approximately 37,000 members and not just 159 Challengers. Our role is confined to determining whether the expense, regardless of the amount, is germane because it is related to negotiations or the performance of representational functions.

Accordingly, we find that all expenses related to the MCF fund for 1992 are germane and properly charged to non-member agency fee payers.

VIII. *Air Safety Expenditures*

The role of the arbitrator is to make a determination of the expenses claimed to be germane and chargeable to agency fee payers. That role is not dependent on whether an issue is raised by any Challenger regarding the expense. It is in that context that the undersigned arbitrator requested additional information relating to expenses involving air safety. Having raised the issue and having requested details for the claims, estimated to exceed $3 million, the counsel for the Challengers then argued that the safety expenses should not be treated as germane and that they had not been sufficiently explained to justify that allocation.

The Union asserts that safety expenses have never been challenged and that the witness, who testified regarding such expenses, was not cross-examined by Challenger's counsel.

The Union argues that safety is critical to its collective bargaining, grievance processing and day-to-day dealings with the airlines. The expenses involve an Engineering and Air Safety Department and Accident Investigation Department, two of the eleven departments; pilots being assigned to various committees and being reimbursed for lost pay; local and regional air safety committees; central

technical committees consisting of staff and pilots; and experts with knowledge of regulations.

The Union points to collective bargaining provisions dealing with safety involving qualifications of instructors, training time, and rest periods. All of these matters involved knowledge of regulations and technical knowledge of operations, as well as expertise in physiology.

The Union asserts that safety information is relevant in processing grievances. It contends safety information is translated into collective bargaining proposals. It refers specifically to the work of the Airport Standards Committee, Airworthiness Committee, All Weather Flying Commitee, Air Traffic Control Committee and the Charting and Instruments Committee (CHIP), as examples of committee's reports that are used in negotiations.

The Union argues that accident investigations and pilot reporting systems provide knowledge for negotiations and representation of its pilots.

In dealing with the role of the Union and its relationship to Federal regulatory agencies and the carriers, the Union noted in part:

> In the airline industry, the roles of employer and government are inextricably intertwined on matters of safety. As we have noted, the federal government is intimately involved in setting the standards by which the pilots performance as an employee will be judged. For example, a pilot may refuse to traverse a field in fog because of inadequate signage, mindful of the Detroit accident that was attributed in part to such inadequacies. Should a grievance or violation action ensue, the Airport Standards Committee will be called upon to render technical assistance based upon its knowledge of that and other airports. The results of ALPA's investigation into the Detroit accident will also contribute to its representation in any such grievance. Furthermore, ALPA may work with the com-

pany and the airport to effect improvements. Despite the involvement of the government agency in the original accident investigation and in the setting of standards, the union's work pertains directly to its duties as collective bargaining representative, whether or not a collective bargaining agreement or a successful grievance results. The union speaks to the employer only as a collective bargaining representative, and may engage in a range of discussion, negotiation, and pressure tactics to persuade the employer not to discipline the pilot, to see the problem as the pilot sees it, and to work toward an improvement. That the government may play a role in setting or revising the standard does not limit the union's ability to act as collective bargaining representative any more than the existence of the Fair Labor Standards Act affects a union's right to charge for the negotiation of hours of work.

In regard to its Aircraft Evaluation/Certification Committee and its accident investigations, the Union asserts that, although contracts do not dictate aircraft, the results of the safety information obtained are used in negotiations.

The Union cites *Lehnert* to support charges for safety on the basis that in *Lehnert*, the Supreme Court permitted charges for publishing information of special interest to teachers.

The undersigned is in the position of rendering a decision on expenses that, by their very nature, are most important to all pilots, to the public generally and to the flying public in particular. There is no doubt that the Union's investigation of accidents serves a public good, even if it supplements the Federal government's official investigation. There is no question that committees considering air traffic control procedures, aircraft airworthiness, airport standards, all weather flying, hazardous materials, CHIPS, human performance, aviation weather and ground deicing, among others, which may supplement Federal regulatory studies and efforts and carrier studies and efforts, are most

beneficial to the pilots represented by the Union, as well as all of the public. The Union's role in establishing local, regional, and national air safety groups and in providing a system for pilots to report safety problems, is most desirable as a function of a professional organization and for the public, in general.

The Union's role in Air Safety, as set forth in its "Air Safety Manual", is:

> Air Safety is the primary responsibility of every airline pilot and is, therefore, a prime concern of the Air Line Pilots Association. The professional pilot in carrying out this responsibility to his passengers and to the general public knows that this responsibility cannot be delegated to anyone—not to employers, not to federal aviation agencies, nor to any other agency or person.
>
> Furthering air safety is the primary reason for publication of this Manual. It is a compilation of the procedures ALPA has formulated over many years, and it is intended for use as a general informational guide for all ALPA air safety activities.
>
> The evolution of these procedures and the ALPA Air Safety Structure occurred for a simple reason: During the execution of normal duties, aircrews cannot conduct experimentation, system or procedural analyses, or equipment evaluations effectively. These things must be done independently from line flying. Recognizing this need, ALPA provides the Air Safety Structure to enable pilot volunteers to conduct critiques of their operating environment and to report unsafe conditions to proper authorities. To supplement this volunteer activity, the Engineering and Air Safety Department provides continuity and technical expertise.
>
> Airline pilots each day utilize practically every commercial aviation facility in the world and every type

of commercial aircraft component, such as powerplants, navigational equipment, etc. Hence, pilots provide a means for continuous monitoring of all aviation facilities. Routine pilot reporting and special incident reports provide the aviation industry with its greatest source of information to determine what safety problems exist. The Association considers the discovery and reporting of air safety problems to be one of the primary safety functions of the airline pilot. Thus, the main role of the ALPA Air Safety Structure is to provide channels of communication for reporting such problems.

An additional role for the Air Safety Structure is to serve as a stimulus for continued alertness within individuals for the detection of hazards, incidents, or nonstandard practices in daily operations. The role of the pilot as a critic of the system must be maintained, but the critic must be introspective as well. Professionalism and air safety go hand in hand.

A third role for the Air Safety Structure is to participate in the investigation of all air carrier accidents. The responsibility for the discharge of these duties lies with the President's Department through the Director of the Accident Investigation Department and the ALPA Accident Investigation Board, in conjunction with the respective airline pilot group.

This is the ALPA viewpoint and a description of some of ALPA's activities in the field of air safety. The scope of activity is potentially limitless and the problems are myriad. It is a constant challenge to keep this dynamic and rapidly growing industry a safe means of transportation and to fulfill the pilots' primary responsibility for the maximum degree of safety.

The Union's Assistant Director in the Representation Department, who has been involved in the administration

of collective bargaining agreements, testified, in relevant part, as follows:

> In the broader sense, though, you know we represent pilots before the FAA in enforcement actions arising out of aircraft accidents, so obviously the information gained from the accidents is of great significance in terms of our representation of the pilot's interest in general, and trying to make out the best body of law possible on behalf of pilots, as those cases develop.
>
> With regard to other things to be learned from the aircraft accidents, in the broader sense of collective bargaining being deliberations, discussions with management, with a view toward shaping the operation that's not necessarily reflected in the collective bargaining agreement, as an Association we do that all the time through our safety structure and even through the folks in my department as well, and we meet with management, we meet with the FAA, and we try to implement, have implemented safer procedures which are not necessarily involved or embodied in the collective bargaining agreement. And, that is one of our representative functions, no doubt, the people in the accident investigation and the engineering air safety side, and the committee people who work on those technical committees spend a lot of their time doing that.
>
> Now, does each and every one of their suggestions or recommendations get embodied in the collective bargaining agreement, absolutely not, but do they get embodied in changed procedures, or influence changes in the FARs, absolutely yes.

* * * *

Now economic analysis is much more targeted, it's a very specific support function for the collective bargaining process. But, the safety side deals with how pilots conduct their job, only some of which we really bargain about at the bargaining table. A lot

of it we are dealing with the carrier, in terms of thcir operating policies and procedures, and with the FAA in terms of their operating policies, procedures and standards, which are not necessarily embodied precisely in the collective bargaining agreement. I think I tried to say that before, that if you look at collective bargaining in a narrow sense, as what's happening right at the bargaining table, well then, you know, some of what we get from the air safety we don't use in that sense. But, if you look in the broader sense, in terms of how a pilot conducts the professional side of his life, not his personal pecuniary interests, wages and expenses and that kind of stuff, but how he conducts his professional life, how he flies safely from A to B, how he operates the aircraft in the environment, that kind of stuff, then we draw on that from the air safety structure.

Based on the record before us, we are satisfied that there is sufficient relationship between accident investigation and the representation of pilots in grievances, in existence or potentially arising, to be a chargeable item to agency fee payers. It follows that the expenses of the Accident Investigation Department are chargeable to fair share payers as germane.

We also find that the existence of a national clearing house for air safety and medical issues relating to pilot and carrier relations involving negotiations and contract administration to warrant a finding that the central air safety and medical expenses are germane expenses.

The evidence does not establish any direct linkage between contract negotiation or contract administration and the functions of various committees involved in air safety. Thus, we must determine whether these expenses, which are unique to this professional association/labor organization, fall within the category of chargeable expenses not *directly* related to representational duties.

In the only case addressing similar expenses, *Lehnert v. Ferris Faculty*, 500 U.S. 503 (1991), the Court addressed the Union's use of its publication to inform teachers on matters of concern to teachers, education generally, professional development, job opportunities, and related matters. The Court held,

> Informational support services such as these are neitheir political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis*. See 466 U.S., at 456.

In a related area, the Court in *Lehnert* stated:

E

The Court of Appeals rules that the union could use the fees of objecting employees to send FFA delegates to MEA and the NEA conventions and to participate in the 13E Coordinating Council, another union structure. Petitioners challenge that determination and argue that, unlike the national convention expenses found to be chargeable to dissenters in *Ellis*, the meeting at issue here were those of affiliated parent unions rather than the local, and therefore do not relate exclusively to petitioners' unit.

We need not determine whether petitioners could be commanded to support all the expenses of these conventions. The question before the Court is simply whether the unions may constitutionally require petitioners to subsidize the participation in these events of delegates from the local. We hold that they may. That the conventions were not solely devoted to the activities of the FFA does not prevent the unions from requiring petitioners' support. We conclude above that the First Amendment does not require so close a connection. Moreover, participation by mem-

bers of the local in the formal activities of the parent is likely to be an important benefit of affiliation. This conclusion is supported by the District Court's description of the 13E Coordinating Council meeting as an event at which "bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units." 643 F. Supp., at 1326. As was held in *Ellis*, "[co]nventions such as those at issue here are normal events . . . and seem to us to be essential to the union's discharge of its duties as bargaining agent." 466 U.S., at 448-449.

The principle involved in fair share fee payers being charged certain expenses and not other expenses is clearly set forth in *Lehnert* as follows:

> This is not our first opportunity to consider the constitutional dimensions of union-security provisions such as the agency-shop agreement at issue here. The Court first addressed the question in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), where it recognized the validity of a "union shop" agreement authorized by § 2, Eleventh, of the Railway Labor Act (RLA) as amended, 64 Stat. 1238, 45 U.S.C. § 152, Eleventh, as applied to private employees. As with the Michigan statute we consider today, the RLA provision at issue in *Hanson* was permissive in nature. It was more expansive than the Michigan Act, however, because the challenged RLA provision authorized an agreement that compelled union membership, rather than simply the payment of a service fee by a nonmember employee.
>
> Finding that the concomitants of compulsory union membership authorized by the RLA extended only to financial support of the union in its collective bargaining activities, the Court determined that the challenged arrangement did not offend First or Fifth Amendment values. It cautioned, however: "If

> 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235 (footnote omitted). It further emphasized that the Court's approval of the statutorily sanctioned agreement did not extend to cases in which compelled membership is used "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Id.*, at 238.
>
> *Hanson* did not directly concern the extent to which union dues collected under a governmentally authorized union-shop agreement may be utilized in support of ideological causes or political campaigns to which reluctant union members are opposed. The Court addressed that issue under the RLA in *Machinists v. Street*, 367 U.S. 740 (1961). Unlike *Hanson*, the record in *Street* was replete with detailed information and specific factual findings that the union dues of dissenting employees had been used for political purposes. Recognizing that, in enacting § 2, Eleventh, of the RLA, Congress sought to protect the expressive freedom of dissenting employees while promoting collective representation, the *Street* Court construed the RLA to deny unions the authority to expend dissenters' funds in support of political causes to which those employees objected.
>
> Two years later in *Railway Clerks v. Allen*, 373 U.S. 113 (1963), another FRLA case, the Court reaffirmed that holding. It emphasized the important distinction between a union's political expenditures and "those germane to collective bargaining," with only the latter being properly chargeable to dissenting employees under the statute.
>
> Although they are cases of statutory construction, *Street* and *Allen* are instructive in delineating the bounds of the First Amendment in this area as well. Because the Court expressly has interpreted the FRLA "to avoid serious doubt of [the statute's] con-

stitutionality," *Street*, 367 U.S., at 74e9, see *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984), the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments. Specifically, those cases make clear that expenses that are relevant or "germane" to the collective bargaining functions of the union generally will be constitutionally chargeable to dissenting employees.

They further establish that, at least in the private sector, those functions do not include political or ideological activities.

It was not until the decision in *Abood* that this Court addressed the constitutionality of union-security provisions in the public-employment context. There, the Court upheld the same Michigan statute which is before us today against a facial First Amendment challenge. At the same time, it determined that the claim that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities could establish, upon a proper showing, a First Amendment violation. In so doing, the Court set out several important propositions:

First, it recognized that "[t]o compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222. Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. See, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes

> both the right to speak freely and the right to refrain from speaking at all").
>
> Second, the Court in *Abood* determined that, as in the private sector, compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public employees. Similarly, an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective bargaining representative.
>
> * * * *

In *Ellis v. Brotherhood of Railway, Airline, and Steamship*, 466 U.S. 435 (1984), the Supreme Court, addressing matters under the same statute that controls this Union, stated, in relevant part:

> 5. There is no First Amendment barrier with regard to the three challenged activities for which the statute allows the union to use petitioners' contributions. The significant interference with First Amendment rights resulting from allowing the union shop is justified by the governmental interest in industrial peace. Forced contributions for union social affairs do not increase the infringement of the employee's First Amendment rights. And while both union publications and conventions have direct communicative content, there is little additional infringement of First Amendment rights, and none that is not justified by the governmental interests behind the union shop itself.

Thus, the major concern in determining whether a non-member may be charged for an expense incurred by the Union is whether that expenditure, considering the purpose behind a fair share arrangement, imposed a "significant interference with First Amendment rights." We have carefully considered the nature of safety expenditures, as noted above, and cannot find any ideological characteristic to those expenditures so that *any non-member* can object

to those activities on constitutional grounds. They are not organizational activities which may be opposed by those against unionization. It does not involve expenditures that have a political purpose, such as lobbying. The safety activities do not deal with racial issues which may be opposed by some non-member.

We do not believe that the following Court's statement in *Lehnert* warrants a different view. The Court stated:

> The Court of Appeals determined that the union constitutionally could charge petitioners for certain public-relations expenditures. In this connection, the court said: "Public relations expenditures designed to enhance the reputation of the teaching profession . . . are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." 881 F.2d at 1394. We disagree. Like the challenged lobbying conduct,

In *Lehnert*, the Court found the public relations activities could be viewed as political in nature. We find no basis to concluded that ALPA's safety expenditures are political. We do not view input into FAA regulations as political in the accepted context of that phrase.

Despite the fact that no Court has dealt with the matter of safety issues, we find that, based on the Court decisions set forth above and the rationale in those decisions, the Union's expenditures for safety committees and safety activities involving various problems faced by the pilot represented by ALPA, are properly charged as a germane expense.

IX. *IFALPA and ITW Contributions*

The Union made a per capita payment to the International Federation of Air Line Pilots Association (IFALPA) in the amount of $680,686.24 during 1992.

It also made a payment to the International Transport Workers (ITW) in the amount of $31,087.80.

IFALPA's literature states its operations and purpose as follows:

> Internally, the Federation develops and constantly updates an international pilots viewpoint on all matters impacting upon the profession and affecting generally the safety of air transport operations. It achieves this through the work of a number of specialist Committees, all comprised of active airline pilots. In this way, it may be said that IFALPA Speaks For Pilots.
>
> The Federation maintains detailed policy manuals which serve as briefs for IFALPA representatives attending meetings throughout the world at which decisions affecting industry standards may be taken. These representatives are all active airline pilots and in this way Pilots Speak For IFALPA.
>
> In particular, IFALPA interacts with other major aviation bodies such as ICAO, the Airports Council International (ACI), the International Air Transport Association (IATA), the Flight Safety Foundation (FSF), the Society of Automotive Engineers (SAE), and the International Federation of Air Traffic Controllers Associations (IFATCA). It presses both for the adoption of international standards and their implementation at national level.
>
> Within the Federation, a forum exists for exchanging information and ideas among pilots, and for fostering goodwill and comradeship within the profession. A comprehensive range of mutual assistance policies is in place, which *inter alia* provides for assistance to pilots involved in legal, accident- or security-related problems abroad and a corps of IFALPA accredited accident investigators is on hand to assist local Member Associations in providing pilot input to the investigation of accidents occuring in their territories.

The ITW is interested in international air safety oversight.

Because we have no knowledge as to how either organization spends its monies and whether any expenditures are made for causes opposed by the non-member agency fee payer, we shall exclude both amounts as chargeable germane expenses.

X. *Publications*

The Union's testimony indicates that 45% of its cost of issuing publications were found to be nongermane based on a review of lines and pages in all publications.

We have reviewed sample publications and find no basis to conclude that this figure, one of many charges subject to an outside audit, are other than correct and reasonable. For example, in the August 1992 publication "Air Line Pilot", there was a two-page article on the Union label and a small part of one page regarding support for the ALPA-PAC in a magazine of 65 pages. The magazine dealt with matters of interest to the pilots as professionals, safety and reports regarding the Union's performance of its representational role.

Since the cost of actual publications were allocated on the basis that 45% is nongermane, we must conclude that other costs associated with publicity, in general, should similarly be allocated so as to exclude 45% to non-member agency fee payers. Thus, the following items carried as germane expenses shall be reallocated on the formula of 45% nongermane to 55% germane.

Newsletter Editors-Services in the amount of $13,523.65 was not so allocated and should be. Thus, $6,085 should be subtracted from the germane expenses chargeable to agency fee payers.

The review of the record reveals that telephone, computer usage, and taxes were split between germane and nongermane involving publications, as well as organizing, lobbying and charity viewed as nongermane.

The evidence reveals that items listed as printing costs are linked to negotiations and not publications or public

information. Accordingly, on the record before us, we are satisfied that the general charges for printing the various publications, document processing, related computer and telephone charges have been allocated so as to exclude nongermane publication costs.

XI. *Litigation*

The Union has excluded from germane charges such litigation expenses as are assigned to specific cases not directly affecting the instant Challengers. Most of these expenses involved outside counsel and are listed in the SGNE under Litigation. The total amount excluded from expenses payable by agency fee payers was $8,334,236.

This exclusion of litigation, not directly related to the unit, does not ban the expenses of operating a legal department to perform the functions related to negotiations, contract administration, and other representational functions. Thus, expenses of the legal department, including rent and support services, are chargeable. As the Court stated in *Ellis*:

> 5. *Litigation.* The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, or jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative.

XII. *Rent*

Testimony indicates that rent charges, including utilities, are allocated by project which are then separated into germane and nongermane expenses. Thus, we find no basis to disagree with charges under general administration

or union administration in Appendix B 1 and 2 regarding such allocations.

XIII. *Government Affairs*

The Union maintains a Government Affairs Department consisting of 10 employees. That office, per the evidence, is involved in lobbying and some general activities not involving lobbying. The record indicates that $903,247 has been charged as nongermane legislative activities.

We are unable to determine what, if any, additional expenses were incurred by that department. The record indicates some unspecified amount of expenses of the Government Affairs Department were charged as germane because they involved attending staff meetings, general administration and training.

In our view, *all* expenses of a unit that performs lobbying are nongermane where they involve hiring, directing, supporting and reporting on lobbying and legislation. Accordingly, the Union is directed to identify expenses of the Government Affairs unit and change any germane charges to nongermane charges and to adjust the total of all charges to agency fee payers to reflect those changes.

XIV. *General Expenses*

Expenses of maintaining the Union's existence, of having officers and employees perform chargeable representational functions, performing those functions involved in housing and operating the Union as an institution, have been held to be chargeable as germane expenses.

The Supreme Court in *Lehnert* stated:

> Petitioners' contention that they may be charged only for those collective bargaining activities undertaken directly on behalf of their unit presents a closer question. While we consistently have looked to whether non-ideological expenses are "germane to collective bargaining", *Hanson*, 351 U.S., at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.

> The court recognized as much in *Ellis*. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent union's national conventions It reasoned that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." 466 U.S. at 448. We see no reason why analogous public-sector union activities should be treated differently.

Assuming that some officers or employees devote some small amount of their time to lobbying or other management activities, the record before us establishes that the space, the facilities, and the time used are for germane activities. It has been recognized than an exact accounting of expenses for germane purpose chargeable to agency fee payers is not to be expected.

The use of general funds to operate the union as an institution was also noted in a footnote in *Machinists v. Street*, 367 U.S. 740, when the Court noted:

> In *Detroit Mailers* the Board explained. "Neither on its face nor in the congressional purpose behind [Section 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the Union. [D]ues collected from members may be used for a variety of purposes, in addition to meeting the Union's cost of collective bargaining. Unions rather typically use their membership dues to do those things which the members authorized the Union to do in their interest and on their behalf."

Based on the above, we find that the expenses listed under General Administration and Union Administration meet the tests of being designed to operate the Union as an institution as intended by its members and does not involve lobbying or organizing, which have been excluded. These expenses, consisting of salaries and other expenses of officers and employees and costs of facilities and equipment, meet the test in *Lehnert* that:

> chargeable activities must (1) be "germane to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

XV. *Delta Challengers*

The Challengers, the vast majority of whom are Delta Airline pilots, argue that they should be charged only expenses related to the negotiation of the Delta contract and cost of servicing that contract.

For the reasons set forth above, we find that ALPA, operates as a unified Union where each contract has some affect on all carriers, albeit not a direct measurable impact, and that thereforer no basis exists for establishing a unit by unit system of charges. No case supports the Challengers' contention that they be charged only expenses *directly* related to and germane to Delta's contract. We, accordingly, reject that request and all arguments linked to that assertion.

AWARD

Based on the evidence, the parties' positions and the discussion set forth above, the undersigned makes the following Award:

1. The Air Line Pilots Association (ALPA) computation of germane and nongermane expenses for the purpose of determining the amount of fees payable by agency fee

payers for 1992 is found supported by the evidence and applicable Court decisions.

2. The amount is as set forth in Appendix B, which is to be reduced by subtracting from germane expenses, other than the MCF charges, the following expenses:

a. Payments to International Federation of Air Line Pilots Association (IFALPA) in the amount of $680,686.24;

b. Payments to International Transport Workers (ITW) in the amount of $31,087.80;

c. Charges for Newsletter Editor Services in the amount of $6,085; and

d. All charges of Department of Government Affairs.

3. All charges for germane expenses are chargeable to all non-member agency fee Challengers regardless of the identity of their employing carrier.

4. Charges for the Major Contingency Fund (MCF) are proper and are all chargeable to non-member agency fee Challengers regardless of their employing carrier.

5. In agency fee chargeable to non-members shall be modified to reflect the changes set forth in paragraph 2 above.

6. The Challengers, who are proper parties to this proceeding, are those listed in Appendix A attached.

7. The undersigned will retain jurisdiction for thirty (30) days for the sole purpose of correcting any arithmetic errors or names in Appendix A and to approve the revised amount of the germane expenses chargeable to agency fee Challengers.

Original dated August 10, 1994

Amended September 30, 1994

/s/ Louis Aronin
LOUIS ARONIN

APPENDIX A.

LIST OF CHALLENGERS
Included in
AAA Case No. 16-673-00277-93DS

Abbott, Ted M.
Anderson, Clarence A.
Anderson, J. Eric
Archer, Gregg B.
Armstrong, Jim
Asay, Donald E.
Baitis, Walter W.
Banks, Richard A.
Barnes, R. B.
Bauer, David
Betts, Earl P.
Bilskie, R. P.
Blake, Allan G.
Boline, Laurel F.
Boschetto, Dale M.
Boyce, Allen W.
Brinton, David L.
Brittenham, John C.
Brushwyler, Robert
Buck, Peter
Burgess, Jerald C.
Burson, G. D.
Byrne, Charles R.
Cecka, Robert J.
Chamberlin, Alvin W.
Cinotto, Gary R.
Cody, Harold J.
Coley, George S.
Cook, William J.
Crayton, III, J. J.
Cumming, R. E.
Cutter, Jr., G. R.
Dennis, Guy
Develis, Joseph A.
Dhamer, Robert T.
Doiron, W. David
Ehmann, P. J.
Ehmer, James S.
Elder, Joseph M.
Elin, Richard A.
Elmore, Jerry O.
Elmquist, Bruce E.
Engel, Robert D.
Etter, George W.
Ferdinand, George
Fletcher, Ferdinand E.
Fossum, Neil B.
Fow, G. Ray
Franks, Stanley K.
Fuller, Dell
Gaines, Alan L.
Gebo, Gary
Gibbons, James A.
Glazier, Patrick
Gravino, Nicholas
Greulich, Dennis E.
Guilliat, Gary L.
Haedrich, Bruce W.
Haines, George S.
Halloway, Benjamin F.
Hannan, Michael T.
Harper, Jack N.
Harper, Douglas R.
Harrison, John C.
Hayden, Harvey L.
Hector, George
Heinz, Jr., Howard C.
Hobbs, Robert W.
Ice, Jr., Willard F.
Ideker, Jr., Lester H.
Inderrieder, R. L.
Insogna, Dominic M.
Jackson, Jr., Rollin A.
Jacobs, Paul C.

Jenkins, John P.
Jones, George P.
Jones, W. Larry
Kinard, Samuel R.
Kozimer, Kenneth G.
Lacroix, Jr., Edward W.
Little, Frank R.
Lynch, John L.
Lyon, David E.
Martin, Frank C.
Massey, Donald E.
McGaw, William A.
McGibney, Michael D.
McHargue, Gary R.
McKinstry, Thomas
McNeil, Dane W.
McNeil, Charles H.
Miller, Charles R.
Miller, Dale E.
Miller, Robert A.
Mogensen, E. J.
Monroe, Robert Sean
Morin, Ronald A.
Morrow, C. Richard
Munton, James W.
Naber, David G.
O'Brien, Jr., Robert M.
Paulsen, Paul E.
Pedrazzini, Donald
Peel, Dale F.
Peterson, Larry W.
Phillips, John B.
Pierce, Richard S.
Pierce, Robert A.
Pittman, James R.
Prentke, Lawrence A.
Pupich, George S.
Radula, R.
Rector, John C.
Reed, David L.
Riebow, Jr., Robert L.
Robinson, Jr., Charles E.
Rogers, L. A.
Rogers, Gordon G.
Rose, Gregory J.
Rowe, John D.
Roy, Allan H.
Scheinblum, Roberto P.
Schwartz, James L.
Shackelford, Kenneth L.
Sharp, John M.
Shaughnessey, Kevin
Sherman, Craig A.
Simmons, Gary D.
Smit, Henricus V.
Smith, Minor A.
Stookey, Murray V.
Stuppy, II, Laurence
Sullivan, Steven B.
Taylor, Larry J.
Taylor, Frank
Tebay, Richard
Thompson, John S.
Thompson, John A.
Thorn, Don L.
Tichacek, Richard
Tidwell, James A.
Tonnesen, Roger J.
Uselmann, Edwin D.
Vance, Frederick B.
Vanderhorst, Thomas J.
Villaume, Mark L.
Waldron, Denis F.
Walker, Gerald H.
Warner, Robert W.
Waterman, George B.
Watson, Neal C.
Weast, Don
Wolf, Jr., Howard C.
Wucik, Edward J.
Wysong, Henry Y.
Young, W. Bruce
Ziminsky, Robert V.
Zink, W.

AIR LINE PILOTS ASSOCIATION
REPORT AND STATEMENT OF
GERMANE AND NONGERMANE EXPENSES

[Logo]

REPORT OF INDEPENDENT ACCOUNTANTS

June 14, 1993

To the Board of Directors and Pilots Represented by the Air Line Pilots Association

We have audited the accompanying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992. This statement is the responsibility of the Association's management; our responsibility is to express an opinion on this statement based on our audit. We conducted our audit in accordance with generally accepted auditing standards which require that we plan and perform the audit to obtain reasonable assurance about whether this statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for the opinion expressed below.

We have been informed by management that the Association bases the determination of germane and nongermane expenses for the calculation of its refunds on the definitions, significant factors and assumptions described in Note 3.

In our opinion, the aforementioned statements presents fairly, in all material respects, the germane and non-

germane expenses of the Air Line Pilots Association for the year ended December 31, 1992 based on the definitions, significant factors, and management assumptions referred to above.

This report is intended solely for the information and use of the Board of Directors and pilots represented by the Air Line Pilots Association and should not be used for any other purposes.

/s/ Price Waterhouse
PRICE WATERHOUSE

AIR LINE PILOTS ASSOCIATION
STATEMENT OF GERMANE AND NONGERMANE EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1992

Germane expenses:		
Negotiations	$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	55,559,797	81.00%
Nongermane expenses:		
Litigation	$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	13,035,531	19.00%
Total expenses	$68,595,328	100.00%

The accompanying notes are an intergral part of the Statement of Germane and Nongermane Expenses.

AIR LINE PILOTS ASSOCIATION
NOTES TO THE STATEMENT
OF GERMANE AND NONGERMANE EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1992

NOTE 1—ORGANIZATION AND HISTORY

The Air Line Pilots Association (the Association) is a non-profit unincorporated association organized to promote the interests of the air line pilot profession and to safeguard the rights, individually and collectively, of its members. The Association is exempt from payment of federal and state income taxes under Section 501(c)(5) of the Internal Revenue Code and state statutes, respectively, with the exception of income derived from unrelated business sources, principally advertising and subscription income related to its publication "Air Line Pilot".

In 1970, the Association formed The 1625 Massachusetts Avenue, N.W. Corporation (the Corporation) which owns and operates various land and buildings which are occupied by the Association and other tenants. The Corporation is exempt from payment of federal and state income taxes under Section 501(c)(2) of the Internal Revenue Code and state statutes, respectively, with the exception of income derived from unrelated business sources, principally rental income from real property. (Note 2).

Kitty Hawk Insurance Company, Ltd. (Kitty Hawk) was incorporated under the laws of Bermuda on October 15, 1991 to underwrite the pension fiduciary liability of its parent, the Association, as it pertains to the Association, its members who serve as the Association's authorized representatives, and the Association staff members who perform certain support functions in this area.

NOTE 2—SIGNIFICANT ACCOUNTING POLICIES AND EXPENSE RECOGNITION

The expenses of the Corporation and Kitty Hawk are not included in the statement of germane and nongermane expenses.

Basis of Accounting

The Association records expenses on the accrual basis of accounting in accordance with generally accepted accounting principles. The total expenses reflected in the statement of germane and nongermane expenses are based on the expenses of the Association; and modified as discussed above and below.

Project Expenditures

The Association's accounting system includes a system of "functional" accounts, known as project codes, which allow the Association to track costs by the projects for which they are incurred. The accounting system records every expense by both natural cost category and by project code. Each project code captures activities and expenses that have a common purpose or goal.

Employee wage and benefit costs are allocated to specific projects, based upon contemporaneous time records. Rental expenses are allocated to project codes as well, based upon the actual square footage occupied for those projects. Each of these projects is reviewed and allocated to a germane or nongermane category based on the nature of the expense.

Biennial Convention

Costs of the Association's biennial conventions are provided for monthly based on management's estimate of the actual costs.

Depreciation and Amortization

Depreciation is computed using the straight-line method over the estimated useful lives of the assets (25 to 40 years for buildings and improvements and 3 to 10 years for furniture and equipment). Leasehold improvements are amortized over the terms of the related leases.

Income Taxes

The Association is subject to federal and state income taxes on its unrelated business income. The Association files a consolidated federal income tax return with its wholly-owned subsidiary, the Corporation. During 1992, the Association incurred net losses from unrelated business activities on a consolidated basis aggregating approximately $135,000. At December 31, 1992, the Association had net operating loss carryforwards aggregating approximately $2,154,000 available to offset taxable income through 2006.

Pension Plans

The Association sponsors deferred tax savings plans and an unqualified defined benefit pension plan to eligible employees. Under the deferred tax savings plans, the Association matches employee contributions $2 for each $1 contributed up to a maximum of 10% of the covered pre-tax compensation for participating employees. During 1992, the Association recognized $620,000 and $1,983,000 in expense related to the pension and deferred tax savings plans, respectively.

Commitments and Contingencies

The Association leases office space in various cities for use as field offices and certain equipment primarily for data processing services. Under certain rental agreements the Association pays a portion of the personal property taxes and any increases in operating expenses in addition to

rental payments. As of December 31, 1992, future minimum lease payments required under operating leases for the next five years which have initial or remaining noncancelable lease terms in excess of one year are as follows: 1993, $1,145,000; 1994, $849,000; 1995, $311,000; 1996, $345,000; 1997, $313,000. Rent expense on a consolidated basis aggregated approximately $899,000 in 1992.

Related Party Transactions

The Association leases office space for its Herndon, VA, Washington, D.C. and certain field office locations from the Corporation. Rent expense for these locations totalled approximately $1,432,000 in 1992.

In 1990, the Executive Board resolved that the Major Contingency Fund (the MCF) would pay the Corporation's interest on the debt secured by the Herndon and Washington properties. In return, the excess of revenue over expenses (after approved reserves) generated by the Washington property is transferred to the MCF as an offset to the interest payments. The net MCF transfers to the Corporation, which is included as an MCF expense, totalled $508,807 in 1992.

Insurance premiums paid to Kitty Hawk to underwrite the Association's pension fiduciary liability totalled approximately $100,000 in 1992.

Litigation

At December 31, 1992, there were several legal actions against the Association in various stages of pre-trial, trial and appeal proceedings. In the opinion of management, based on available information, the Association has meritorius defenses to certain of the actions. In addition, due to the preliminary status of some of the litigation, it is not presently possible for management or legal counsel to foresee the ultimate resolution of all the pending litigation.

However, none of the cases under litigation are expected, by management (including in-house legal counsel), to have a material impact on the consolidated financial statements of the Association.

Other Postretirement Benefits

The Association provides health care benefits for currently retired employees. Currently, these costs are recognized as an expense on a "pay-as-you-go" basis. During 1992, the Association recognized $600,000 in expense for those benefits.

Management had previously anticipated the cost of retiree health benefits. An actuarial valuation is being performed to estimate the costs of the liability associated with these benefits. Additionally, although management had begun funding the costs of the liability in December 1988, they are currently developing a funding policy to be commensurate with the results of the actuarial valuation.

In December 1990 the Financial Accounting Standards Board (FASB) issued Statement of Financial Accounting Standards No. 106 (Statement), "Employers' Accounting for Postretirement Benefits Other Than Pensions" which requires these costs to be expensed over the employees' service period on an actuarially determined basis. Adoption of the Statement is required for the Association's 1995 financial statements. Management is currently reviewing its impact on the Association's financial condition and will adopt the Statement when required.

Major Contingency Fund

The Major Contingency Fund (the MCF) is a designated fund established to provide funds to treat issues of urgent concern that could significantly or adversely affect the airline piloting profession, and which cannot be funded by normal Association budget practices and policies. Expenditures must be authorized by two-thirds of the Execu-

tive Board. Such expenses are treated as germane or nongermane on the same basis as all other Association expenses.

NOTE 3—MANAGEMENT DEFINITIONS, SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE CATEGORIZATION OF EXPENSES AS GERMANE AND NONGERMANE

Germane Expenses

Under law, individuals who are not members of a union but who are nevertheless compelled to pay union dues or fees under an agency shop are entitled to object to sharing the cost of any union activities not germane to collective bargaining. Such individuals are entitled to a pro rata adjustment for any expenditurues that are not germane. Union expenses are considered "germane to collective bargaining" if they are (1) germane to collective bargaining activity, (2) justified by the government's policy interest of promoting labor peace and avoiding "free riders," and (3) not an additional burden on freedom of speech. Included among these costs are expenses incurred in connection with the negotiation and administration of collective bargaining agreements, the filing and processing of grievances and arbitration of disputes arising from those agreements, leadership training, and the costs incurred in maintaining the Association as an administrative organization. The specific expenses included in this category are described as follows:

Negotiations

This designation includes the costs of negotiating agreements with member airlines. Included are major mid-term negotiations, such as occurred at Delta and Northwest; normal mid-term negotiations such as occurred at United; and formal Section 6 contract negotiations. Virtually all represented airlines engaged in one or more of these types of negotiations during 1992. Section 6 negotiations were commenced, continued, or completed during 1992 with Allegheny Commuter Airlines, Air Midwest, Atlantic Southeast Airlines, Atlantic Coast Airlines, Business Express, ComAir, DHL Airways, Henson Airways, Mesaba, Reeve Aleutian Airlines, Ross Aviation, Simmons Airlines, States West, Trans World Airways, Trans World Express, and US Air. Negotiation costs include those incurred by the ALPA Negotiating Committee and other officials in the course of meeting, preparing for and conducting negotiations, communicating with pilot groups before and throughout negotiations, and conducting continuing meetings with management representatives to address new issues and resolve disputes as they arise. The expenses of the Association's Local Councils, Master Executive Councils, and national governing bodies are also included here, since most of their meetings are devoted to collective bargaining issues. The Association's aviation safety-related expenses, closely related to its negotiations, are included as well in this category.

Grievances

Expenses associated with processing grievances and System Board and Retirement Board proceedings to resolve disputes arising under collective bargaining agreements are captured in this category.

Union Administration

Union Administration costs are those expenses associated with maintaining the Association's institutional structure as a labor union, and include the costs arising from the democratic process. Expenses include flight pay loss and expenses for the Association's national officers (other than the President), voting and balloting costs, dues billing and collection, and maintenance of agency shop agreements.

General Administration

This category captures general overhead and administrative expenses associated with maintaining and staffing offices throughout the country. Insurance costs, the President's salary, and the costs of the Association's administrative department and accounting and reporting functions are included in this category.

Nongermane Expenses

Nongermane expenses include the costs of activities not directly related to collective bargaining. Included among these costs are expenses incurred in helping pilot groups to organize themselves, lobbying and political activities, and some public relations and litigation expenses. The specific expenses included in this category are described as follows:

Litigation

The Association interprets recent court cases to allow the treatment of most of its litigation as germane and and chargeable, at a minimum, to the pilots employed by the airline or airlines affected by the litigation. However, administrative considerations make such an allocation impractical at this time. For purposes of this report, the Association has chosen to treat such litigation as nongermane.

Organizing

The expenses of the Association's assistance to employees interested in organizing themselves for collective bargaining purposes are treated as wholly nongermane.

Charitable

The Association's charitable activities include contributions to the United Way, administration and funding of a college scholarship program, and support for a reward program to apprehend terrorists.

insurance

The Association administers several insurance programs for active and retired members and their families. That portion of the premiums that is retained by the Association as a fee for administering the programs has been offset against the total cost of providing the insurance, and the net cost is treated as nongermane.

Legislative

All expenses identified with legislative activity have been treated as nongermane.

Publications

Forty-five percent of the net cost of Air Line Pilot Magazine, after considering subscription and advertising revenue, is treated as nongermane to collective bargaining to reflect the ratio of germane to nongermane materials in the magazine and the Association's other publications. The remaining 55% of expenses is captured in the Negotiations category. The costs of Master Executive and Local Council newsletters are also allocated between Negotiations, a germane category, and Publications, a nongermane category, on the same basis.

Media and public relations expendiutures have been included in this category as well.

Affiliation fee

The Association's annual per capita payment to the AFL-CIO is treated as nongermane.

NOTE 4—RECONCILIATION TO AUDITED FINANCIAL STATEMENTS

The Association's total expenses for the year ended December 31, 1992 were $69,623,139, as reported in its audited financial statements. Because the expenses subject to rebate were reduced by the advertising and subscription income received from the Air Line Pilot magazine and revenue from the Association's insurance programs, the total expenses must be reduced accordingly. The adjusted expenses subject to rebate are reconciled to the audited financial statements as follows:

Total Association expenses per audited financial statements	$69,623,139
Less: Advertising and Subscription Revenue	(1,052,491)
Less: Insurance Program Revenue	(484,127)
Add: Interfund transfer from MCF (Note 2)	508,807
Adjusted expenses subject to rebate	$68,595,328

AIR LINE PILOTS ASSOCIATION'S BREAKDOWN OF GERMANE AND NONGERMANE EXPENSES BY PROJECT

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	NEGOTIATIONS
Legal-General	415,001.49
Misc Legal Research	20,422.86
Legal Counsel—Misc Committee	1,848.28
Legal Counsel—Nat'l Officers	19,514.15
Insurance—Member Medical	163,932.75
Investment Management	40,318.63
Investment Manager Evaluation	1,838.06
Performance Monitoring	54,619.46
Retirement Board Meeting	10.00
Retirement Research-General	9,434.11
Pilot Benefit Summary	4,804.68
Representation—General	1,910,144.05
Representation Staff Seminar	1,625.99
ALPA Negotiations Seminar	5,111.18
Economic Analysis—General	257,044.88
Age—Wage Analysis	2,723.38
CAB Data Analysis	18,923.49
Developmental Research	425.59
General Statistical Analysis	561.78
Negotiations Questionnaire	5,311.65
Pilots Rates Of Pay	1,078.39
Financial Analysis—Airline	13,529.30
Research—Industry	70,623.78
Research—Member Related	14,473.49
Research—Staff	965.09
Summary of Agreements	14,922.01
Major Med For Members	1,787.84
Work Stoppage & Strike Asmt	494.43
Engineering—General	118,428.55
E&AS Resource Center	50,865.12

DESCRIPTION	NEGOTIATIONS
FAA Reviews	6.27
FAA Inspections	1,592.65
FAA Aviation Rulemaking Advis	14,899.05
Accident Investigation—Gen	107,635.74
Accident/Incident Analysis	241,076.97
News Summary	6,559.95
Speech Writing	13,125.66
Publications—General	45,448.37
Advertising/Magazine	78,658.13
Advertising Administration	31,552.43
Advertising Promotion	12,536.86
Art/Production—Magazine	288,514.52
Copy Preparation	87,864.10
Editing	74,693.64
Editorial Administration	82,611.68
Photography—Magazine	17,193.57
Photography—Member	462.40
A/L Pilot Manuscript Review	5,776.39
Subscription Administration	18,977.48
Subscription Promotion	23.96
Flying The Line II	965.56
Magazine Editors Seminar	310.37
Finance Model	8,621.85
Newsletter	414.63
Per Cap Fees-IFALPA	680,686.24
Per Cap Fees-ITW	31,087.80
HIMS II Video Production	805.00
MEC Meeting Support	9,870.11
A/I NCA 07/25/78 MI	2.12
Accid Invest-TWA 4-4-79 MI	175.62
Accid Invest-MDR 8/24/84 CA	33.81
Accid Invest-Midwest 09/06/85	57.23
Accid Invest-REP EXP 3/13/86 M	135.85
Accid Invest AVA 02/19/88 NC	7,166.24
Accid Invest-PAA 12/21/88 UK	558.88
Accid Invest-UAL 02/24/89 HI	4,881.30
Accid Invest-BCA 03/31/89 NY	3.66
Accid Invest-UAL 07/19/89 IA	171.39
Accid Invest-NPA 12/26/89 WA	990.28

DESCRIPTION	NEGOTIATIONS
Accid Invest-AAA 11/11/90 GA	37.20
Accid Invest-NWA 12/03/90 MI	51.19
Accid Invest-CCR 1/31/91 WV	1,562.29
Accid Invest-AAA 2/1/91 LAX	3,174.24
Accid Invest-UAL 3/3/91 CO	43,188.27
Accid Invest-ASE 4/5/91 GA	11,936.28
Accid Invest-BEX 12/91 RI	6,794.74
Accid Invest-DAL 1/7/92	334.82
Accid Invest-AAA 1/18/92	9,195.33
Accid Invest-Air Inter 1/20/92	270.93
Accid Invest-CCR 3/12/92 TN	5,209.37
Accid Invest-AAA 3/22/92 NY	163,541.89
Accid Invest-TWA 7/30/92 NY	94,616.26
Incid Invest-NWA 10/18/89 CO	22.68
Incid Invest-WES 1/31/92 WA	1,056.43
Incid Invest-AAA 2/8/92 San Ju	15,855.25
Incid Invest-AAA 4/22/92 NC	140.72
Incid Invest-DAL 4/24/92 NY	950.12
Accident Update Publication	19.75
Air Safety Activities-Print	76,531.96
Air Safety Seminar	21,523.60
Air Safety Workshop	96,245.33
Basic Accid Invest Course	59,923.82
Organization For Safety	2,663.08
UAL Incidents-Miscellaneous	8.50
ALPA Hot Line	2,194.19
Industry/FAA Reg Meetings	27,840.65
Civil Reserve Air Fleet	726.71
ALPA Pilot Reporting System	32,499.13
Central Air Safety Meetings	22,342.02
FAA Int'l Conf on Ground De-Ic	8,877.18
Flight Time/Duty Special Proj.	17,023.04
NASA ASRA Advisory Subcommitte	7,576.67
Accident Investigation Board	22,359.19
Accident Survival Committee	82,237.29
Air Safety Coordinators	2,747.84
Airport Standards Committee	161,008.51
Airworthiness/Perf Committee	163,815.15
All Weather Flying Committee	118,522.45

DESCRIPTION	NEGOTIATIONS
ATC Committee	250,883.55
Aviation Weather Committee	69,682.18
CHIPS Committee	135,311.43
Exec Air Safety Struc Chrmn	87,231.25
Hazardous Materials Committee	65,662.72
Human Performance Tech Cmtee	83,682.64
New Aircraft Eval/Cert Cmtee	65,471.35
Noise Abatement Committee	70,458.86
Pilot Training Committee	96,252.38
Regional Air Line/Short Haul	57,032.63
Caribbean Rgnl Safety Coord	332.18
Central Rgnl Safety Coord	3,876.21
Great Lakes Rgnl Safety Coord	2,647.65
Hawaiian Rgnl Safety Coord	15.78
Mid-Atlantic Rgnl Safety Coord	378.11
New England Rgnl Safety Coord	80.31
Northeastern Rgnl Safety Coord	1,094.88
Northwest Rgnl Safety Coord	16,513.27
Rocky Mtn Rgnl Safety Coord	97.81
Southern Rgnl Safety Coord	80.66
Southwest Rgnl Safety Coord	2,691.50
NW Pacific Rgnl Sfty Coord	12,705.49
SW Pacific Rgnl Sfty Coord	933.30
Aircraft Coordinators	3,363.55
A-320 Study Group	9,535.30
SAE Ground De-Icing Ad Hoc Com	19,505.47
Aeromedical Advisor-Support	7,342.50
Aeromedical Advisor	629,001.33
Airport Survey	157.79
Bilateral—General	79,358.62
Board of Directors	1,018,620.95
Drug Testing Task Force	1,398.05
Drug Testing Policy	3,215.16
Executive Board	477,189.86
Executive Committee	316,353.65
IFALPA Annual Conference	66,570.75
IFALPA Projects	223,174.13
Industry Activities	282,723.59
ALPA Leadership Conf. 6/89	246,962.25

DESCRIPTION	NEGOTIATIONS
TAA Support	5,607.82
Field Office Support—Print	68,977.64
LEC Support—Printing	32,321.85
R & I Seminar	303.26
Videotape Program	33,470.88
FTL/FED EX Merger Committee	7.50
FTL Representation Comm II	17,464.25
EAL IAM Indirect Strike Supp	1,455.09
Pan Am Pension Settlement	15,619.10
Digital Fit Data Rec Monitor	22,362.01
MEC Training Seminar 8/90	22,662.90
Furlough Assistance Program	23,562.14
PAA-UAL Arbitration (UK Route)	35,790.27
PAA Job & Benefit Workshop	51,700.62
MDW Job & Benefit Workshop	189.69
Simmons Expedited Negotiations	22,930.38
Mortality Study	189.39
Newsletter Communications	5.73
Comair Expedited Negotiations	34,108.51
Age 60 Committee	759.61
BOD Steering Committee	19,454.61
Collective Bargaining Cmtee	22,052.49
Education Committee	3,062.02
Exec Chr Aeromedical Resources	8,876.90
Flight Time/Duty Time	15,747.52
FT/DT Task Force	1,288.37
Flight Security Committee	53,555.36
IFALPA Activities Committee	32,566.24
Intl Flight/Duty Time Task F	1,157.00
Medical Exam Review Panel	2,652.86
Professional Standard Comm	5,552.31
Regional Airlines Study Subc	3,920.83
Schedule Review Committee	834.73
Merger Policy Blue Rbn Cmtee	348.36
National "No B Scale" Comm	111.00
Council On Aviation Accredit	640.88
Review & Recovery of Benefits	2,991.49
Career Re-establish Task Force	533.20

DESCRIPTION	NEGOTIATIONS
Employee Assistance Program Co	6,096.09
Intntl Aviation Task Force	24,434.36
CRAF Advisory Committee	2,107.62
Alcohol Testing Task Force	4,988.07
Pilot Training Review Task For	32,368.29
Code Sharing Relations and Pol	3,244.71
Pilot Training Services Commit	49.46
Accident Investigation	103, 805.80
Central Air Safety	1,001,160.38
Employee Stock Owership	21,446.79
HIMS Project	38,611.81
Industrial Relations Committee	1,884.03
Investment Committee	14,329.51
MEC Aeromedical Coord.	32,566.20
MEC CAB Data Analysis	68,203.63
MEC Chairman	352,584.92
MEC Financial Analysis	257,176.56
MEC Flight Pay Loss Bank	1,228,821.51
MEC Hotel Committee	90,754.36
MEC Meetings	3,029,584.41
MEC Newsletter	257,471.01
MEC Offices	3,253,263.22
MEC Pilot Pay Rates	3,408.38
MEC Professional Standards	35,461.25
MEC Questionnaire	3,621.86
MEC Scheduling	255,887.33
MEC Secretary/Treasurer	238,487.89
MEC Training	173,367.82
MEC Vice Chairman	316,986.80
New Aircraft Evaluation Cmtee	4,005.21
Uniform Committee	821.10
MEC Security—Safety	6,920.06
MEC Family Awareness Committee	10,361.88
MEC Bid Closing Committee	5,707.02
MEC Mediation/Arbitration	4,764.65
International Flying Committee	7,378.57
MEC Agreement Analysis	8,410.11
MEC Contract Proposal Costing	5,574.73
MEC Negotiation Questionnaire	16,539.86

DESCRIPTION	NEGOTIATIONS
Contract Negotiations	4,158,517.91
Negotiations Training Seminar	1,777.67
MEC Central Scheduling	24,279.83
Insurance Negotiations	28,825.27
Insurance Openers	5,383.70
MEC Insurance	69,834.20
MEC Retirement	1,412,345.89
Pension Negotiations	41,652.46
Pension Openers	3,279.09
Local Council Legal	4,014.51
PAA Pension-Prudential Annuity	5,404.94
Roberts' Supplemental Award #5	7,464.26
Communication Family Awareness	264,102.96
AAA Strike Preparedness	71,551.25
USAir MEC Internal Communicati	845.79
USAir MEC Family Awareness	111,840.14
Strike Preparedness	864.60
CAL Member Expense	14,895.95
UAL MEC International Comm	13,168.61
TWA—Icahn Privatization	2,656.04
Regional Move-Up Committee	1,676.76
Dispute Resolution Cmtee—NWA	140,924.01
Dispute Resolution Cmtee—REP	104,358.42
AMW Fragmentation	348.32
HNA MEC Member Assistance	22.62
Midway Continuation Activity	142.55
NWA Blue Book Merger Cmtee	79,000.43
TWA "B" Plan Transition	21,071.10
PAE—Special Contract Negot	1,445.06
TWA Icahn Exit MCF	2,631,630.38
ARW Ad Hoc Comm for Spec. Proj	5,293.34
NWA Strategic Planning Committ	62,970.99
EAL II Misc Programs	75,249.64
EAL II Related Legal Expense	10.50
EAL II Stress Management-Pierr	122.64
EAL-IAM Direct Strike Suppor	103,443.09
EAL MEC: Officers & LEC Members	7,141.32
EAL MEC: Communications Cmtee	2,015.45
EAL Strike Andit Committee	94,448.83

DESCRIPTION	NEGOTIATIONS
EAL MEC: June Davis Task Force	4,557.73
EAL MEC: Review Board	66,127.95
NWA Retirement Review Committe	27,875.13
NWA Roberts Quota Implementi	37,877.54
Temporary Duty (TDY) DAL MEC	20,851.91
Negotiating Cost Recovery-AAA	375,000.00
Executive Administrator-DAL	50,208.39
Dissolution of ARW	17,653.29
Air Traffic Control/Operations	4,144.78
MEC Merger Committee	254,284.51
AAA/PAI Merger	132,600.88
DAL/WAL Merger	314.77
EAL/TAC Merger	108.15
NWA-REP Merger	40,606.72
OZA/TWA Merger	18,161.94
PAA/UAL Pacific Routes Transfe	484.79
NWA/REP Merger-Green	133,000.76
NWA/REP Merger-Red	215,729.71
PAA/UAL London Routes Transfer	72,087.03
PNL/ALG Merger	133,967.85
TPS/AAA Merger	127,676.45
TPS Special Projects	4,406.10
Metro/Simmons/AMR Corp Merger	30,357.33
Administrative Cost—Strike	353.31

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	GENERAL ADMINISTRATION
Administration—Payroll	253,057.16
President Dept—General	564,298.99
General Manager—General	244,374.59
Human Resources—General	322,556.34
ALPA Staff Fringe Ben—S/L	80,348.58
ALPA Staff Fringe Ben—Other	66,091.20
ALPA Staff Union—Admin	85,415.49
Dependent Business Travel	39,676.04
Education Administration	2,488.39
Educational Assistance	39,968.45
Employee Recreation	1,500.00
ALPA Notes	1,709.27
Personnel Recruiting	21,666.37
Personnel System	730.13
Personnel Conferences	6,590.32
Salary Administration	9,505.68
Staff Mgmt Seminar	487.42
Staff Pin Awards	20,357.23
Personal Leave—Unit II	14,162.91
Retiree Health Insurance	600,667.45
Summer Intern Program	46,378.79
Questionnaire Development	34.40
Insurance	125,372.83
401(K) Master Plan	2,351.50
Atlanta Contract Office	43,729.44
Chicago Contract Office	59,284.43
Los Angeles Contract Office	830.21
Miami Contract Office	1.28
Minneapolis Contract Office	69,229.67
New York Contract Office	56,924.80
San Francisco Contract Office	10,428.25
Washington, D.C. Administratio	313.37
St Louis Contract Office	29,420.20
Denver Contract Office	285.00
Pittsburgh Contract Office	66,176.27

DESCRIPTION	GENERAL ADMINISTRATION
Employee Development	76,478.60
General Finance	389,519.67
Budget Preparation	57,140.27
Cash Controls	72,237.17
Financial Analysis	2,535.30
Financial Reporting	185,319.44
Annual Audit	119,767.59
Governmental Reporting	31,242.33
Investment Analysis	170.34
General Accounting	511,576.54
Accounts Payable	680,623.24
Accounts Receivable Processing	26,783.63
Admin Payroll Accrual	719,822.87
Bank Service Fees	34,400.97
Accounts Payable—FPL	105,756.34
Payroll Processing	104,422.78
Accounting System Maintenance	280,708.30
Membership—General	191,708.33
ALPA Telephone Directory	5,235.17
ALPA Admin Manual/Ofc Proc	19,739.94
Key Entry Conversion	2,143.20
Member Benefit Programs-Genera	2,835.02
Property Subsidy	15.38
Dir E&AS—General	160,440.39
Access	12,108.24
Info Systems/Services-General	153,419.04
Data Resources—General	62,554.75
Stairs Data Bases	6,527.96
Systems Development-General	327,695.85
Accts Rec System Development	4,067.06
Data Processing Security	51,241.66
Generalized Reporting	3,953.96
Online CICS Activity	306.37
Outside EDP Service	17,857.82
Representation Model	43.78
Software Install & Maint	340,099.00
Flight Time/Duty Time Sys Supp	110.31
Payroll Computer System Supp	206.74
Communications System Support	2,260.25
Financial Reporting Systems	32,243.09

DESCRIPTION	GENERAL ADMINISTRATION
Database Management-General	145,797.01
Info Systems Long Range Plan	21,395.92
Work Flow/Image Processing	27,377.70
Conversant Programming	39,716.07
Image/Document Processing: Ph.	176,707.17
Image/Document Processing: Ph.	67,193.74
Image/Document Processing: Ph.	62,897.23
Image/Document Processing: Ph.	8,712.49
Info Processing—General	103,976.58
Info Processing Charge Out	179,930.04
CO/TS Support	30,334.15
OSSS Support	8,893.23
Micrographics Support	4,294.55
I/P PC Hardware Support	32,190.79
I/P PC Software Support	6,251.58
I/P Chargeback Support	18,951.68
I/P Access Support	13,013.67
I/P Voice Mail Support	4,984.41
I/P Telephone Support	3,609.68
I/P Special Projects	27,301.59
General Telephone Chargeout	560,986.96
Access Chargeout	906.30
CICS Utilities	588.62
Production Database Overhead	276.99
Test Database Overhead	895.35
Access ALPANews Usage	3,672.78
Computer Ops—General	1,120,709.29
Computer Ops Charge Out	1,119,787.71
IDMS Online Charges	238,448.72
CMS Online Charges	69,459.90
System Software Installation	16,954.19
System Software Maintenance	99,176.85
Mainframe Software Utilities	85,187.39
Word Processing—General	211,085.77
Data Entry—General	3,044.67
Departmental Admin Support	25,326.04
Word Processing Charge Out	120.00
Help Desk	6,797.45
Telephone	78,167.06
FAX	10,898.98

DESCRIPTION	GENERAL ADMINISTRATION
Execubill	17,528.61
Micrographics—General	18,378.86
Printing—General	2,422,162.09
Printing Charge Out	2,480,208.55
Mailing—General	152,694.70
Mailing—Charge Out	122,762.53
Computer Ops—Clearing	285.87
Office Admin—General	403,018.85
Communication & Transport	173,204.01
Equipment—DC Office	250.00
F/O Support—Administration	2,967.89
F/O Support—Visits	5,537.43
Hotel—General	21,197.99
Moving Expense	586.43
Purchase Processing	25,534.20
Records Management	287,837.25
Office Rent Charges	1,182,264.00
Equipment Depreciation Charges	324,049.02
Office Telephone Charges	587,607.47
Atlanta Field Office	280,836.96
Atlanta Office Building	787.62
Chicago Field Office	252,699.67
Denver Field Office	183,138.93
Houston Field Office	204,668.23
Miami Field Office	242,836.48
Minneapolis Field Office	301,101.32
New York Field Office	263,135.38
San Francisco Field Office	288,012.18
Seattle Field Office	120,673.16
1625 Mass Ave Real Estate	2,286.23
Herndon Real Estate	2,316.98
Access System Administration	45,737.81
Access System Support	46,773.19
Access System Maintenance	780.86
Access Upgrade Support	57,062.31
Aspen System Administration	387,286.47
Aspen System Support	18,625.69
Vars System Support	20,766.90
Vars System Maintenance	3,028.25

DESCRIPTION	GENERAL ADMINISTRATION
Vars System Upgrade	16,679.06
Office Automation Administrati	334,876.78
Office Automation Upgrade	164,839.73
Herndon Office Support	110,374.47
D.C. Office Support	44,169.86
Field Office Support	14,558.54
MEC Office Support	15,399.48
FTL MEC Assessment	156.30
Office Conference Support	4,252.20
Severance Pay—Exempt	175,378.57
Special Washington Office	898,119.41
Printing—Fixed Cost	233,352.00
60th Anniversary Celebration	265.37
Personal Property Tax	85,378.35
Part-time Work Task Force	6,787.46
Job Enrichment Through Trainin	180,374.09
EDP Advisory Committee	24,170.00
Conference Facilities	19,471.36
Field Services Special Study C	1,065.52

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	UNION ADMINISTRATION
1st Vice President—General	98,458.38
Administration—1st VP	216,027.67
Secretary—General	172,591.67
Administration—Secretary	82,745.78
Treasurer—General	307,312.45
Adminstration—Treasurer	70,262.32
Audit—Field Offices	3,541.66
Audit—MEC	1,632.53
Executive Administrator—Gen	67,500.87
Executive Administrator	239,346.93
Fiduciary Liability Insurance	303,292.30
Captive Insurance	101,741.90
MEC Misc Support	175,269.58
Agency Shop Maintenance	95,936.00
Delinquent Member Activity	70,095.16
Letter Production	39,208.91
Dues Processing	69,199.67
Assessment Processing	50,784.37
Balloting	82,831.49
Direct Airline Input	21,799.97
Dues Adjustment Processing	115,424.96
Dues Check-Off Processing	234,357.27
LEC & MEC Assessment	6,247.24
Member Document Tracking	28,731.62
Pilot Information Maintenance	66,862.22
Roster Verification Program	70,022.46
Member Credentials	110,692.03
Reference/Research	81,755.43
Relations—Industry	99,926.64
Relations—Member	211,273.69
ALPA Hangar Publication	1,584.02
Newsletter Editors-Services	13,523.65
ASPEN	289,269.95
ALPA Constitution & By-Laws	350.56
Bulletin (Info Distribution)	52,293.89

DESCRIPTION	UNION ADMINISTRATION
Computer Training Seminars	2,166.70
Exec VP—Group 1	2,819.22
Exec VP—Group 2	6,358.89
Exec VP—Group 3	2,912.79
Exec VP—Group 4	2,731.30
Exec VP—Group 5	3,766.54
General Counsel Expenses	283,401.06
LEC Support—Meetings	3,327.62
National Officer Election	1,711.88
Arbitration/Litigation	3,993.97
Regional Meetings	33,352.16
President's Annual Report	21,039.15
Ballot Printing	42,123.89
LEC Support—Admin	56,195.27
Rebate 1990	64.09
Election Protest Activity	36,536.14
Rebate 1991	40,196.10
LEC Support—Telephone	32,106.88
Rebate 1992	9,463.68
Exec VP-AAA Group A	400.00
Exec VP-DAL Group A	400.00
Exec VP-NWA Group A	400.00
Exec VP-UAL Group A	400.00
Exec VP-TWA Group B	400.00
Exec VP-Group C (Salz)	400.00
Exec VP-Group D (Abel)	400.00
Exec VP-Group D (Travitz)	400.00
ALPA Financial Structure Com	42,622.19
BOD Election Procedures Study	4,701.00
Cmtee for Restructure & Financ	156,114.29
Appeal Boards	16,473.11
Ballot Certification Comm	10,376.63
Hearing Boards	18,689.96
LEC-MEC Training/Education	19.56
MEC Administration	3,042,542.45
MEC Duty Officer	346,996.41
MEC Misc Administration	293,115.68
MEC-Local Council Support	38,591.26
Dues Enforcement—Delta	9,662.01

DESCRIPTION	UNION ADMINISTRATION
EAL MEC: Article VIII Ad Hoc	9,359.82
NWA Information Systems	13,944.59
Pan Am Express Custodianship	39,826.26
Pan Am Custodianship	159,281.00
Midway Commuter Custodianship	7,592.60
Midway Custodianship	26,294.83
Eastern Custodianship	179,119.97
Zenith Custodianship	7,659.91
TWA LEC 3	26,208.00
UAL LEC 5	716.01
DAL LEC 9	3,502.36
NWA LEC 10	977.36
UAL LEC 11	11,160.00
UAL LEC 12	36,241.83
NWA LEC 13	1,126.08
DHL LEC 17	2,389.66
NWA LEC 20	14,980.52
PAE LEC 22	106.87
PRE LEC 23	174.41
HNA LEC 28	1,835.48
HNA LEC 29	1,494.00
AAA LEC 32	2,502.00
HNA LEC 35	1,314.00
STW LEC 36	26.60
CMR LEC 37	5,326.60
CCR LEC 40	2,610.00
AAA LEC 41	7,120.80
CMR LEC 45	2,363.98
DAL LEC 47	24,106.81
DAL LEC 48	876.76
ARW LEC 50	1,566.47
NWA LEC 55	219.98
REV LEC 59	675.00
ARW LEC 60	216.81
JTS LEC 61	691.32
ALA LEC 63	1,908.00
ALA LEC 64	609.60
HAL LEC 65	3,194.74
JTS LEC 69	442.73
NWA LEC 74	2,778.15

DESCRIPTION	UNION ADMINISTRATION
ROS LEC 75	239.47
ALG LEC 78	1,413.24
ALO LEC 80	2,238.39
DAL LEC 81	8,647.32
SAI LEC 83	3,909.68
AMW LEC 84	18.16
AMW LEC 86	84.08
AAA LEC 90	32,400.00
PNL LEC 91	486.00
PNL LEC 92	400.68
AAA LEC 94	35,820.00
PNL LEC 95	1,026.97
SUN LEC 105	235.27
MSA LEC 106	364.19
DAL LEC 108	3,029.94
ASE LEC 113	1,530.00
CRN LEC 115	464.70
ZAL LEC 121	400.00
DAL LEC 124	2,430.00
MDC LEC 128	37.45
EXA LEC 130	1,894.33
SAI LEC 132	522.00
USS LEC 135	3,840.06
MRK LEC 137	460.62
AAA LEC 138	5,418.00
ACO LEC 141	1,225.24
EAL LEC 142	119.17
WES LEC 143	30.07
AIS LEC 146	109.68
AAA LEC 148	10,082.96
PAE LEC 149	44.87
BEX LEC 153	999.91
BEX LEC 154	644.53
BEX LEC 155	2,556.40
TWE LEC 156	1,363.19
TWE LEC 157	787.80
TWE LEC 159	259.88

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	GRIEVANCES
Arbitration Index	1,246.78
Grievances	1,344,768.55
System Board	1,775,047.76
MEC Grievance Review Board	19,779.35
Pension Dispute Board	19,923.30
TWA A Plan Lump Sum	3,837.32

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	LITIGATION
ALPA Legal Counsel-Members	24,641.50
Federal Agency—NMB	15,714.58
Federal Agency—Other	6,096.96
EAL Bankruptcy Litigation	12,155.40
ALPA vs TWA (Absentee Plcy)	231.09
ALPA vs DOL (EPPs)	109.03
Baldwin vs Mesa Airlines	60,816.46
Pan Am vs ALPA (re: H. Gay)	1,666.94
ALPA vs DOT (Section 43 Bens)	14,898.24
Turner & Turner vs AMEX & ALPA	930.75
ALPA vs DOT (EPI)	38,584.64
Federal Agency—NTSB	14,679.85
Federal Agency—FAA	17,723.24
LPP Provisions	6,127.44
Paid vs ALPA Lawsuit	701.78
PAA vs ALPA (re: H. Gay)	6,835.00
Exec Cmtee Approved Admin Supp	170,150.14
Rogers & Baker v. ALPA	38,783.07
Landry Case Settlement Fee	200,000.00
FAA Enforcement Cases	698,881.26
FAA Medical Cases	19,786.05
CAB/DOT Litigation	87,561.83
Misc Litigation	489,853.71
Robinson vs ALPA, Braniff	8,681.36
Burnett vs Express I Airline	6,187.01
Miller EEOC Matter	4,337.12
Dean vs TWA & ALPA	61,044.97
EAL Bankruptcy Litigation	145,860.44
ALPA vs Hawaiian Airlines	31,892.98
ALPA vs TWA (Absentee Policy)	53.08
ALPA vs DOT (EAL Petition)	1,826.93
Homer vs Van Hoosen et al	74.75
ALPA vs DOT (LPPs)	6,830.84
ALPA vs Metro (II)	178.39
Frey vs TWA & Aetna	1,941.47

DESCRIPTION	LITIGATION
Tally vs Aetna & TWA	6,271.81
Walker vs ALPA	1,461,414.40
ALPA vs Aviation Associates	8,754.44
Gellert vs EAL	23,734.32
Beckett et al vs ALPA	5,047.73
Kuball vs ALPA	2,414.26
ALPA vs MET et. al.	96.95
Nielsen vs TWA et al	46.36
Berg vs UAL	572.82
Jetstream vs ALPA (Spires)	2,036.03
ALPA vs TWA (Drug Testing)	26.54
Hudson vs ALPA	1,915.94
McWhorter vs Dalfort	1,845.71
TWA W.A.R.N. Act Lawsuit	2,562.79
Frye et al vs ALPA et al	213,261.43
Kuball vs ALPA (Nevada)	14,593.43
Thompson vs ALPA, NWA & Prude	9,664.38
Krantz vs ALPA & Nottke	21,997.50
UAL—570 Litigation	28,711.02
EAL vs Heddon et al	22.65
Transamerica Pension Litigatio	51,050.63
Miller et al vs ALPA & Delta	105,681.35
ALPA vs Solberg	5,591.01
U.S. vs Northwest Airlines	1,110.68
Kehns et al vs Foster et al	39,091.59
Burke vs ALPA & Eastern MEC	15,987.57
OFFCP v. USAir	3,372.56
Langseth EEOC Charge	4,048.52
Aloha v. Hawaii	17,636.39
ALPA v. Schneemilch Et Al	5,502.60
Randall v. Business Express	28,122.65
Nellis,Et Al v. ALPA, et al	1,891,921.76
Offcp v. AAA (II) Rehab. Act	125.51
ALPA v. Higley	86,458.91
McGilvra v. NTSB & ALPA	6,159.49
Baughman v. NTSB	1,390.16
Spellacy, et al v. ALPA	169,674.91
Copeland v. ALPA	28,285.97
Express I v. Roberts	11,513.10
Gropp et al.V. UAL & ALPA	51,467.08

DESCRIPTION	LITIGATION
Dunn V. ALPA (EAL)	34,676.56
Bedall v. ALPA & EAL	70,833.82
Davidson V. ALPA	11,489.37
Olsonoski, et al v. ALPA	3,995.61
Gay v. Carlson, et al	6,877.50
Michelotti v. ALPA	9,217.78
CAL Direct Support	145,302.05
TAC and EAL vs. ALPA	739.47
EAL-IAM Strike Administration	1,089,501.42
BNF Bankruptcy 05/12/82 (1st T	1,198.87
Frontier Bankruptcy	70.21
Wright Bankruptcy 11/84	312.30
BNF Bankruptcy 09/27/89 (2nd T	17,107.46
Presidential Bankruptcy 10/89	261.37
PAA Bankruptcy (01/08/91)	150,344.02
Midway Bankruptcy	42,948.75
Metro Express Chapter 7 Bankru	170.75
Metroflight Chapter 11 Bankrup	44,078.45
Midway Commuter Bankruptcy 3/	3,403.32
Metro (Northeast) Bankruptcy	17,708.98
Pan Am Express Chapter 11	14,103.79
Markair Bankruptcy: 6/8/92	107,644.08
Continental TXI Pension Plan	32,403.07
States West Bankruptcy	4,825.06

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	LEGISLATION
Government Affairs—General	51,352.49
Congressional Testimony Prep	836.92
Congressional Reception	44,282.98
Congressional Relations	265,297.13
Congressional Hearings	3,413.06
Legislative Briefing	13,205.38
Legislative Research	19,546.70
Position Paper Development	146.39
Pension/Insurance Legislation	47,749.02
Research—Governmental	15.00
Congressional Testimony	14,767.97
AFL-CIO Relations	68,957.89
LPP Deregulation	3,313.96
Member Political Education	25,484.34
Presidential Inaugural Activit	14,650.00
Legislative Affairs Cmtee	18,452.45
PAC Steering Committee	65,839.77
Strategic Planning Committee	25,941.33
MEC Legislative Committee	120,870.24
NWA Political Consultant Chgs	98,600.00
EAL II Legislative Program	524.33

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	PUBLICATIONS
Public Relations—General	151,180.45
News Summary	5,367.24
Relations—Press	132,543.38
Relations—Public	26,370.00
Speech Writing	10,739.17
Publications—General	37,185.03
Advertising/Magazine	64,356.65
Advertising Administration	25,815.63
Advertising Promotion	10,257.43
Art/Production—Magazine	236,057.33
Copy Preparation	71,888.81
Editing	61,112.97
Editoral Administration	67,591.37
Photography—Magazine	14,067.46
Photography—Member	378.33
A/L Pilot Manuscript Review	4,726.13
Subscription Administration	15,527.03
Subscription Promotion	19.60
Dir:Communications—General	127,491.97
Magazine Editors Seminar	253.93
Newsletter	339.25
Field Office Support—Print	56,436.25
LEC Support—Printing	26,445.15
Pilot Spokesman Program	2,458.27
Pilot Image Advertisements	3,393.24
Newsletter Communications	4.68
Aviation Community Relations	112,870.67
MEC Communications Project	306,958.54
MEC Newsletter	210,658.10
Pilot Information Committee	329,158.88
US Too	1,881.79

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	ORGANIZING
Trump Shuttle Special Org	1,185.29
Organizing—General	4,812.96
West Air Organizing	4,498.32
TAC Organizing	721.14
FED EX/FTL Organizing	2,791.65
Business Express Organizing	53,596.97
Inactive Participants	9,062.48
New Hire Info Program	25,171.56
Education/P.I.P.—General	413.54
Organizing—ALPA	11,930.38
Pilot Information Program	2,334.85
AIA Support	314,584.17
Fed Ex Organizing	658,106.73
Horizon Organizing	146.98
American Eagle Organizing	6,128.71
Mesa Wholly-Owned Meetings	1,627.71
Skywest Organizing	27,229.30
MEC Membership	36,344.92

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	INSURANCE
Retirement & Insurance—Gen	330,969.84
Dues & Insurance Processing	134,188.74
IFALPA Member Insurance	3,175.14
Insurance Check-Off	3,923.97
Insurance Processing	379,916.49
Member Payment Processing	143,454.61
Member Inquiry	85,742.58
Retirement & Insurance Comm	62,107.47

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	CHARITABLE
Aviation Research & Education	18,451.45
Contributions	56,250.00
Memberships	16,250.00
Mutual Aid	1,055.36
Scholarship Administration	33,070.17

AIR LINE PILOTS ASSOCIATION
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	AFL-CIO
Per Cap Fees-AFL/CIO National	162,211.76
Per Cap Fees-AFL/CIO Other	40,809.15
AIA: Union Privilege Benefits	2,683.66
AFL-CIO MTG 10/19/87	5,423.53

AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 16-673-00277-93DS

In the Matter of Arbitration
between

AIR LINE PILOTS ASSOCIATION (ALPA),
Union

and

AGENCY FEE CHALLENGERS,
Challengers
(Agency Fee Arbitration)

SUPPLEMENTAL OPINION AND AWARD

On August 10, 1994, the undersigned duly appointed Arbitrator issued an Award in the above-referenced matter. The Award directed the Union to recompute the fee chargeable to agency fee payers by subtracting payments to IFALPA and ITW, expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs, on the basis that those charges were nongermane expenses.

By letter dated September 1, 1994, the Air Line Pilots Association submitted revised calculations of germane expenses, pursuant to the Arbitrator's Award of August 10, 1994.

Those calculations resulted in a finding that 79.51% of expenses are germane and chargeable to agency fee payers. We have reviewed the calculations and find that they are correct. Accordingly, we adopt those calculations

and find that 79.51% of the expenses of the Union are chargeable to non-member agency fee payers.

The Union also proposed certain changes in the Arbitrator's opinion involving typographical errors, grammatical errors and some minor corrections regarding the facts in the case. None of the proposed corrections involved any alteration in the Arbitrator's findings or conclusions. None of the proposed corrections affect any material aspect of the Arbitrator's Opinion & Award and are adopted for purposes of clarification and/or to correct obvious errors. We are issuing an Amended Opinion to reflect those changes and corrections.

In response to the Union's proposed corrections and its recalculation of germane expenses chargeable to agency fee payers, Mr. Hudock, representing a number of Challengers, filed a reply.

We have carefully reviewed the reply of the Challengers' counsel which, in substantial measure, reiterates earlier arguments as to the Union's failure to furnish adequate detail of its expenses to permit an appropriate review by the Challengers and by the Arbitrator. It cites ALPA's detailed listing of expenses linked to lobbying activities not previously identified. It then argues that projects identified as involving germane expendiutres were, in fact, devoted to lobbying and were then subtracted as a result of the Arbitrator's order.

We view the Challengers' contentions as no more than an effort to have the Arbitrator reconsider his decision regarding the adequacy of the information provided by the Union regarding its expenses.

In our Opinion & Award, dated August 10, 1994, the undersigned concluded that the Union had provided sufficient detail regarding its expenses and how they were categorized to permit appropriate inquiry by the Challengers and by the Arbitrator. The fact that items not

specifically identified as lobbying expenses were later categorized as nongermane, does not, in the opinion of the undersigned, establish an effort by the Union to intentionally withhold information or preclude appropriate inquiry into all listed expenses. We note that broad categories of expenses were explained. We do not view the failure to specifically explain each of 1,200 projects as evidence of intentional withholding of information necessary to allocate categories of expenses between germane and nongermane expenses. We note that the specific items identified by the Challengers' counsel involved small expenditures. The largest expenditure, subtracted as nongermane because it involved lobbying, relations-member, involved $124,290 and constituted .0018% of total expenses. The total reallocated from germane to nongermane was $300,224, equal to .004% of the total of all expenses.

Based on all of the above, we find no merit in the contentions advanced by counsel for the Challengers and reaffirm our earlier original decision that the Union did provide adequate information to permit a proper inquiry and determination as to the proper charges to agency fee payers.

AWARD

The undersigned Arbitrator issued an Award, dated August 10, 1994, directing a modification of the agency fee originally set as chargeable to nonmember agency fee payers. The undersigned amends that Award by finding that the revised amount of expenses chargeable to agency fee payers is determined to be 79.51% of the expenses of the Air Line Pilots Association.

September 30, 1994

/s/ Louis Aronin
LOUIS ARONIN
Arbitrator

[Filed Jun. 9, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7033

ROBERT A. MILLER, *et al.*,
Appellants

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
an unincorporated association,
Appellee

BEFORE: Silberman, Williams and Rogers, Circuit Judges.

ORDER

Upon consideration of appellee's petition for rehearing filed April 11, 1997, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Silberman concurring in the denial of the petition, joined by Circuit Judge Williams, is attached.

SILBERMAN, *Circuit Judge*, with whom WILLIAMS, *Circuit Judge*, joins, *concurring in the denial of rehearing*: Air Line Pilots Association argues in its petition for rehearing that our opinion is inconsistent with the rationale of *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). In *Cole* we held that an employer can enforce an agreement to arbitrate federal statutory discrimination claims which an employee signs as a condition of employment. *Id.* at 1482, 1484-85, 1487. ALPA concedes that the non-union pilots did not sign a written arbitration agreement, as did Cole, but argues that arbitration is nonetheless a condition of employment because it arises from the agency shop agreement between ALPA and the airline. But, as appellant correctly notes, under the agency shop agreement, ALPA is the agent for the nonmembers only vis-à-vis the employer, it is not an agent for the nonmembers vis-à-vis itself. So *Cole* is irrelevant to this case.

[Filed Jun. 9, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7033

ROBERT A. MILLER, *et al.*,
Appellants

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
an unincorporated association,
Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatal and Garland, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for Rehearing *In Banc*, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Garland did not participate in this matter.